No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that evidence that members of a particular race have been prosecuted for a particular offense is sufficient to justify an order requiring discovery from the government on a claim of selective prosecution, absent evidence that similarly situated persons of a different race have not been prosecuted for that offense.

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin.

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-67a) is reported at 48 F.3d 1508. The panel opinion of the court of appeals (App., *infra*, 68a-104a) is reported at 21 F.3d 1431.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and

including July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1992, respondents Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute, and conspiring to distribute, more than 50 grams of cocaine base (crack), in violation of 21 U.S.C. 846. Respondents were also variously charged in four counts with distributing crack, in violation of 21 U.S.C. 841(a)(1), in one count with possessing crack with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and in three counts with using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). App., *infra*, 4a.

Respondents, each of whom is black, alleged that the United States Attorney's Office had determined to prosecute them because of their race. They sought discovery from the government to obtain information that they asserted would support that claim. The district court granted the motion for discovery. It also adhered to that ruling in denying the government's motion for reconsideration. When the government indicated that it would not comply with the discovery order, the district court dismissed the indictment. A divided panel of the court of appeals reversed, concluding that the district court had abused its discretion in ordering discovery. On rehearing en banc, the court of appeals, by a 7-4 vote, held that the district court had permissibly ordered discovery. It

therefore affirmed the district court's dismissal of the indictment.

1. In support of their motion for discovery, respondents offered only one item of evidentiary support for their claim of selective prosecution: an affidavit from a paralegal employed by the Federal Public Defender for the Central District of California. App, *infra*, 5a, 71a. The affidavit stated that, based on a review of all cases closed by the Federal Public Defender's Office during 1991 that involved substantive drug offenses or drug conspiracy offenses in violation of 21 U.S.C. 841 and 846, all of the 24 defendants charged with a crack offense were black. App., *infra*, 5a. The government opposed respondents' motion for discovery, arguing that respondents had failed to establish a sufficient threshold showing of selective prosecution to justify an order compelling discovery. *Id.* at 71a.

The district court found that respondents' showing was sufficient to justify discovery. The court stated that the number of cases and the time period covered by the affidavit, the comparable charges involved in each case, and the fact that all the defendants were of the same race required an explanation. The court ordered the government: (1) to provide a list of all cases from the prior three years in which the government charged both crack and firearms offenses; (2) to identify the race of the defendant in each case; (3) to state whether each case was investigated by federal or state law enforcement authorities or by a joint federal and state effort; and (4) to explain the criteria used by the United States Attorney's Office in deciding whether to bring crack charges in federal court. App., *infra*, 5a.

The government moved for reconsideration of the court's discovery order. In support of its motion, the government provided evidence, based on an informal survey of Assistant United States Attorneys in the Central District of California, that at least 11 non-black defendants had been indicted on crack charges during the period covered by respondents' affidavit. C.A. Excerpts of Record (E.R.) 32-33, 123-124. Four of those 11 were represented by the Federal Public Defender. *Id.* at 32-33. The government also submitted computerized records showing that from 1989 to 1992 approximately 2,400 defendants had been charged with drug offenses under 21 U.S.C. 841 and approximately 1,700 defendants had been charged with drug conspiracy offenses under 21 U.S.C. 846. E.R. 75-85.

In addition, the government submitted affidavits from the two officers who had investigated this case. Those affidavits stated that race had played no role in the investigation and that the case had been referred for federal prosecution because it involved provable crack and firearms offenses that met the United States Attorney's guidelines for federal prosecution. E.R. 24-28. The government also submitted the affidavit of the then-Chief of the Criminal Complaints Section of the United States Attorney's Office, who explained that "[a]ll charging decisions are made on the basis of whether a federal offense that meets this Office's guidelines has occurred, the overall strength of the evidence, the deterrence value and federal interest associated with the particular case, the criminal history of the suspects, and other race-neutral criteria." *Id.* at 29. He further stated that this case met the general criteria because: it involved more than 100 grams of crack, which was in excess of

twice the amount necessary for a ten-year mandatory minimum sentence; the case involved multiple sales and multiple defendants, indicating a fairly substantial crack ring; the case was jointly investigated by federal and state agencies; firearms were used in connection with the drug trafficking; the evidence against respondents was strong, including audio and video tapes of the respondents' illegal activities; respondent Armstrong had made threats against the arresting officers; and several of the respondents had committed prior narcotics and firearms violations. *Id.* at 30.

Finally, the government submitted an affidavit from the Public Information Officer for the Los Angeles Division of the Drug Enforcement Administration (DEA) and a DEA report on crack. The affidavit stated that, for cultural and historical reasons, particular racial and ethnic groups tend to dominate the distribution of particular drugs. In the officer's experience, black street gangs dominate the distribution of crack in the Los Angeles area. E.R. 20-23. The DEA report, "Crack Cocaine Overview 1989," detailed the sociological patterns of crack use and distribution in this country. *Id.* at 35-62. It concluded that Jamaicans, Haitians, and black street gangs dominate the large-scale manufacture and distribution of crack nationwide. *Id.* at 50.

In response, respondents offered an affidavit from one of respondents' defense attorneys stating that she had spoken to an intake coordinator at a drug treatment center in Pasadena, California, who told her that, based on his experience, there are "an equal number of caucasian users and dealers to minority users and dealers." E.R. 85B. A second defense attorney asserted in a declaration that, based on his

discussions with judges, prosecutors, and defense attorneys, many non-blacks are prosecuted in state court for crack offenses. *Id.* at 85D-85E. Finally, respondents offered a newspaper article that stated that the federal penalty for crack offenses is higher than the penalty for powder cocaine offenses and that most federal defendants in crack cases nationwide are black. App., *infra*, 6a-7a, 33a.

The district court denied the government's motion for reconsideration, stating:

> The statistical data provided by [respondents] raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race.

App., *infra*, 7a. After the government indicated that it would not comply with the court's discovery order, the district court dismissed the indictment. *Ibid.*

2. A divided panel of the court of appeals reversed. App., *infra*, 68a-104a. The panel held that, to justify discovery on a claim of selective prosecution, a criminal defendant must demonstrate a "colorable basis for believing that 'others similarly situated have not been prosecuted.'" *Id.* at 80a. The panel determined that respondents' affidavit failed to satisfy that test because it showed only that "others *have* been prosecuted, not that others similarly situated have not." *Ibid.* Without a colorable basis for believing that others similarly situated have not been prosecuted, the panel stated, "the most reasonable

conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental." *Id.* at 80a.

Judge Reinhardt dissented. In his view, a court "must assume * * * that people of *all* races commit *all* types of crimes." App., *infra*, 96a. For that reason, Judge Reinhardt concluded that, "[w]here a defendant shows a reasonable statistical basis for the inference that all defendants charged with a particular federal crime over a significant period of time were members of a single race, such a showing creates, ipso facto, a colorable basis for believing that similarly situated members of other races were not prosecuted." *Id.* at 96a-97a.

3. The court of appeals granted rehearing en banc to resolve a conflict in its cases over the standards governing discovery when a defendant claims selective prosecution. By a 7-4 vote, the court held that the district court had not abused its discretion in ordering discovery in this case. App., *infra*, 1a-67a.

The majority first held that a district court has discretion to order discovery on a claim of selective prosecution when "the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred." App., *infra*, 8a. Rejecting the view expressed in *United States* v. *Bourgeois*, 964 F.2d 935, 940 (9th Cir.), cert. denied, 113 S. Ct. 290 (1992), that discovery should be ordered only in the rare case, the en banc court held that the applicable standard does not establish a "high threshold." App., *infra*, 9a. Instead, it requires defendants to produce "some evidence tending to show the essential elements of the claim," a standard that is met when the

evidence is "more than frivolous and based on more than conclusory allegations," and when defendants "make good faith efforts to obtain whatever evidence is readily available, as well as to provide whatever evidence is already in their possession." *Id.* at 8a, 12a. Because the court believed that proving a case of selective prosecution is difficult and that the information necessary to support such a claim may be in the government's exclusive possession, the court concluded that a more substantial threshold showing should not be required. *Id.* at 11a-12a. The court also held that statistical disparities alone can establish a prima facie case of race-based selective prosecution. *Id.* at 10a & n.1. Because the standard for obtaining discovery should be lower than that required for a prima facie case, the court concluded that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim." *Id.* at 11a.

Applying those standards, the court held that respondents' identification of 24 black crack defendants was sufficient to warrant discovery. The court stated that, although "such a small number of cases does not conclusively establish either of the elements of selective prosecution * * *, the fact that every single crack defendant represented by the Federal Public Defender in all cases that terminated during 1991 was black provides a colorable basis for believing that the challenged prosecutorial policies are driven by discriminatory motives and yield discriminatory effects." App., *infra*, 16a. The government argued that respondents' affidavit failed to establish a disparity and was inadequate to justify

discovery because it "shows only that blacks have been prosecuted, not that others of different races and similarly situated have not." *Id.* at 18a. The court concluded, however, that "[w]e must start with the presumption that people of all races commit all types of crimes." *Id.* at 19a. Otherwise, the court said, "we would be accepting unwarranted racial stereotypes." *Id.* at 19a n.6. The court therefore inferred a showing of racial disparity sufficient to warrant discovery. The court also rejected the government's contention that no evidence of discriminatory purpose had been presented, expressing the view that an unexplained race-based disparity is sufficient evidence of discriminatory intent to justify discovery. *Id.* at 25a.

Chief Judge Wallace concurred in the judgment. App., *infra*, 28a-31a. He rejected the majority's holding that the discovery threshold in a selective prosecution case should not be "high." In his view, "a high threshold 'is appropriate because courts are ill equipped to assess a prosecutor's charging decisions, and oversight of prosecutorial decisions could undermine effective law enforcement.'" *Id.* at 29a. Nevertheless, he concurred in the result in this case because of his view that an appellate court should not overturn a district court's discovery order absent a clear error in judgment. *Id.* at 29a, 31a.

Judge Rymer, joined by Judges Leavy, T.G. Nelson, and Kleinfeld, dissented. App., *infra*, 32a-67a. Judge Rymer summarized her disagreement with the majority as follows:

> For the first time in this circuit or any other, the en banc court has held that a raw number of prosecutions, without reference to a comparison group and without evidence that others, similarly

situated except for their race, have not been prosecuted, provides a colorable basis for the existence of both discriminatory effect and discriminatory intent sufficient to order discovery from the government in connection with a criminal defendant's selective prosecution defense. Also, though both the Supreme Court and this circuit have made clear that discriminatory effect and discriminatory intent are two different elements, each of which must exist, the majority's opinion effectively collapses intent into effect by holding that both may be shown by the same, insubstantial statistic. Additionally the opinion has formally removed the "high threshold" that, until now, we explicitly (and other circuits implicitly) have required to be met before discovery relating to a selective prosecution claim can be ordered. In so doing, the majority opinion radically, and unnecessarily, rewrites the law of selective prosecution.

Id. at 32a. Judge Rymer concluded that, in view of the majority's relaxed standard for ordering discovery, government resources that would better be spent on prosecuting crime will instead be devoted to "chasing statistics." *Id.* at 67a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that trial courts may order discovery on a claim of selective prosecution based solely on evidence that persons of a particular race have been prosecuted for a particular offense, without any evidence that similarly situated persons of a different race have not been prosecuted. The court has further held that the same showing can establish a prima facie case of selective prosecution.

Those holdings fundamentally change the legal principles that have governed selective prosecution claims until now and threaten to have a substantial impact on the prompt and effective enforcement of the criminal law. In particular, by eliminating the requirement that criminal defendants show that others who are similarly situated have not been prosecuted in order to obtain discovery on a claim of selective prosecution, the decision below will cause the diversion of government resources from prosecuting criminal cases to responding to motions, with the necessary effect of impeding prosecutions and delaying trials on the merits.

The court of appeals' decision violates principles established in this Court's cases that sharply limit judicial inquiry into exercises of prosecutorial discretion. It conflicts with decisions from numerous courts of appeals that have required defendants to make a threshold showing that similarly situated persons have not been prosecuted before discovery may be ordered on a claim of selective prosecution. It invites federal district courts to subject routine exercises of prosecutorial discretion to intrusive inquiries in a wide range of cases. And it threatens to impose serious costs on the administration of criminal justice. Review by this Court is therefore warranted.

1. In *Wayte* v. *United States*, 470 U.S. 598, 608 (1985), this Court held that claims of selective prosecution must be evaluated according to "ordinary equal protection standards." Accordingly, to prevail on a claim of selective prosecution, a criminal defendant must show that the enforcement of a criminal statute "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Ibid.*

To establish a discriminatory effect, a criminal defendant must show that others who are similarly situated, except for the protected characteristic, have not been prosecuted. See *id.* at 609-610.

In view of the Court's recognition of the limited role of judicial review over exercises of prosecutorial discretion, the court of appeals seriously erred in permitting discovery to proceed based solely on evidence that persons of a particular race had been prosecuted, without requiring any evidence that similarly situated persons of a different race had not been prosecuted. Except in a case involving direct admissions by officials of a discriminatory purpose, a showing by the defendant that similarly situated persons of another race were not prosecuted is essential to justify a discovery order on a claim of selective prosecution.

The exercise of prosecutorial discretion is a core element of the Executive's power to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. See *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). A prosecutor may not bring charges based on unconstitutional criteria. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, * * * the denial of equal justice is

still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886). Judicial inquiry into the prosecutor's motive must be reserved, however, for the rare case in which there is a substantial and concrete basis for suspecting unconstitutional action in order to avoid encroachment into an area that the Constitution reserves to the Executive Branch.

Exceptional caution in this regard is also appropriate because "the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607. The factors that the government must consider in deciding to prosecute, such as the strength of the case, the general deterrence value, and the government's enforcement priorities, "are not readily susceptible to the kind of analysis the courts are competent to undertake." *Ibid.* And judicial review of prosecutorial decisionmaking "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.*

Finally, to subject a prosecutor's motives to judicial scrutiny at the behest of a defendant imposes high costs on the criminal justice system. Criminal defendants often will transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate." *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976). Absent threshold screening to prevent abuses, defendants would be able to employ claims of selective prosecution and associated discovery demands as powerful tools to delay the resolution of the charges against them. The purpose of a criminal proceeding is to determine a defendant's guilt or innocence, and

"encouragement of delay" in resolving that central issue "is fatal to the vindication of the criminal law." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940).

In light of those principles, it is essential that a defendant make a substantial threshold showing before obtaining discovery on a claim that a prosecutor has abused his broad discretion by relying on discriminatory criteria. In *Wade* v. *United States*, 504 U.S. 181 (1992), for example, the Court considered whether a court may review a claim that the government unconstitutionally refused to file a motion for a departure from a mandatory minimum (or Guidelines) sentence based on the defendant's substantial assistance, and, if so, what showing a criminal defendant must make to obtain discovery to support his claim. The Court noted the defendant's concession that, in order to obtain discovery, the defendant was required to make a "substantial threshold showing" of an unconstitutional motive. *Id.* at 186. The Court then held that, because the defendant had failed to make such a showing, discovery was properly denied. *Id.* at 186-187. In *Wade*, as here, the requirement of a substantial threshold showing properly balances the interest of courts in protecting the equal protection rights of individuals with the necessary judicial hesitance to explore the motives of prosecutors in bringing a criminal case.

2. The court of appeals in this case departed from the established legal standards for evaluating claims of selective prosecution and thereby adopted an incorrect legal test for granting discovery on such a claim. Respondents produced evidence that all of the 24 crack prosecutions closed by the Federal Public Defender in 1991 involved black defendants. The en banc court held that such evidence was sufficient to

support a discovery order. But as the panel in this case explained, respondents' evidence "demonstrates only that others *have* been prosecuted, not that others similarly situated have not." App., *infra*, 80a. The showing therefore contains "a total lack of evidence" (*ibid.*) on one essential element of a selective prosecution claim: the disparate treatment of offenders who are similarly situated but for their race.

The court of appeals recognized that there was no factual showing in this case that the government had failed to prosecute similarly situated persons of a different race. The court held, however, that such evidence is unnecessary because of a legal presumption "that people of all races commit all types of crimes." App., *infra*, 19a & n.6. According to the court, a criminal defendant can rely on that presumption, unless the government introduces "compelling contrary evidence." *Id.* at 19a. Thus, under the court of appeals' analysis, evidence that members of a particular race have been prosecuted is in itself sufficient to warrant substantial discovery, or a significant factual response from the government analyzing the pool of persons who have committed the crimes at issue.

None of the reasons suggested by the court of appeals justifies its new rule dispensing with an essential element of a claim of selective prosecution. The court stated that "[t]he fact that evidence of similarly situated persons who were not prosecuted was submitted in other kinds of selective prosecution claims is of no significance in the context of a selective prosecution case based on race" because, in the court's view, imposing such a requirement in relation to race-based claims "would be accepting

unwarranted racial stereotypes." App., *infra*, 19a n.6. As the dissent in this case stated, however, the "need to identify similarly situated persons who have not been prosecuted does not evaporate when race is advanced as the constitutionally impermissible factor." *Id.* at 63a.

Reliance on a presumption, rather than concrete evidence, to permit the defendant to make a threshold showing of a discriminatory effect runs counter to the settled rule that, "in the context of a criminal prosecution, the Government enjoys a presumption of having undertaken [the action] in good faith and in nondiscriminatory fashion." *Attorney General* v. *Irish People, Inc.*, 684 F.2d 928, 947 (D.C. Cir. 1982) (internal quotation marks omitted), cert. denied, 459 U.S. 1172 (1983). "[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). To overcome that presumption of prosecutorial good faith, the defendant must adduce facts, not assumptions.

Nothing in a claim of race-based selective prosecution requires a different result. Insisting upon evidence that other similarly situated offenders of another racial group have not been prosecuted does not accept racial stereotypes. Rather, it recognizes the empirical possibility that, for socio-economic and historical reasons, members of particular racial and ethnic groups may predominate in the commission of certain crimes. Indeed, the government presented affirmative evidence in this case supporting the conclusion that black individuals dominate large-scale dealing in crack. See App., *infra*, 22a; see *id.* at 72a-73a (panel opinion). The court of appeals, in the

interest of avoiding what it characterized as racial stereotypes, was not free to adopt an evidentiary presumption that has neither a rational nor a factual foundation. Cf. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245-246 (1988); *Turner* v. *United States*, 396 U.S. 398, 404-405 (1970).

The requirement that defendants produce evidence of similarly situated persons who have not been prosecuted is necessary to "discourage fishing expeditions, protect legitimate prosecutorial discretion, [and] safeguard government investigative records." *Bourgeois*, 964 F.2d at 940. At the same time, however, that requirement "still allow[s] meritorious claims to proceed." *Ibid.* In those rare instances in which a claim of selective prosecution has merit, it should not be difficult for a criminal defendant to make the necessary threshold showing. As the cases that have authorized discovery demonstrate, evidence concerning similarly situated offenders is not in the government's exclusive possession. See App., *infra*, 61a n.16 (discussing cases in which defendants introduced evidence that similarly situated persons had not been prosecuted). The present case illustrates that as well. If there were any substance to respondents' claim, they would have had no difficulty producing concrete evidence that similarly situated persons of a different race were being prosecuted by the State of California. Respondents, however, failed to introduce such evidence.[1]

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[1] In ordering discovery in this case, the district court did not rely on the affidavits submitted by counsel for respondents in response to the government's motion for reconsideration, E.R. 184, and the court of appeals made clear that respondents' 24-defendant showing alone was sufficient to support its discovery

The court of appeals did not confine its reformulation of legal principles to the discovery stage. It also held that a prima facie case of selective prosecution could be established without evidence that similarly situated persons of a different race have not been prosecuted. App., *infra*, 10a & n.1. That holding profoundly unsettles the law. Where, as here, "the discretion that is fundamental to our criminal process is involved," *McCleskey* v. *Kemp*, 481 U.S. 279, 313 (1987), statistical evidence is accepted as proof of intentional discrimination only when there is a disparity between the racial composition of the group selected and the racial composition of the group eligible for selection that is so "stark" as to be "unexplainable" on any ground other than race. *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *McCleskey*, 481 U.S. at 293-294 & n.12; *Yick Wo*, 118 U.S. at 373; see *Miller* v. *Johnson*, No. 94-631 (June 29, 1995), slip op. 12. Such proof necessarily entails a showing that similarly situated persons of a different race have not been prosecuted. Absent such a showing, the evidence fails to cast any doubt on the most obvious race-neutral explanation for the prosecutions brought: that the pool of persons prosecuted mirrors the pool of similarly situated offenders.

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order, without regard to the affidavits. App., *infra*, 17a. Even if those supplemental affidavits were considered, however, they contain only vague, conclusory, and impressionistic hearsay. Not only do they fail to provide solid and credible evidence, cf. *Department of Labor* v. *Triplett*, 494 U.S. 715, 724-725 (1990), but they do not show that similarly situated persons of a different race had not been prosecuted.

3. The court of appeals' decision conflicts with decisions from numerous other circuits. Although the courts of appeals have phrased the standard for obtaining discovery in different ways, the circuits that have squarely addressed the issue have all held that, before obtaining discovery, a defendant must make a threshold showing that others similarly situated have not been prosecuted.

For example, in *United States* v. *Cooks*, 52 F.3d 101, 105 (5th Cir. 1995), a defendant prosecuted for conspiring to distribute more than 50 grams of crack sought discovery on a claim that blacks were selectively prosecuted in federal rather than state court. In support of that request, the defendant introduced statistical evidence that the overwhelming majority of those arrested for possession of crack are black and that such arrests have increased tenfold in recent years. *Ibid.* The Fifth Circuit held that discovery was properly denied because the statistical evidence "fail[ed] to satisfy the first prong of the selective prosecution inquiry; it [did] not establish that white defendants committing this offense were prosecuted in state rather than federal court." *Ibid.*

In *Attorney General* v. *Irish People, Inc.*, the D.C. Circuit similarly held that, in order to obtain discovery from the government on a claim of selective prosecution, a defendant must not only introduce evidence of improper motive, but must also "make a colorable showing that he has been especially singled out, that there exist persons similarly situated who have not been prosecuted." 684 F.2d at 946. As the court explained, "[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Id.* at 945. The court expressly held that evidence that there are

unprosecuted similarly situated offenders is essential not only to prove a claim of selective prosecution, but also to obtain discovery on such a claim. The court stated that "we can see no reason for throwing out half the standard on the discovery issue. If either part of the test is failed, the defense fails; thus it makes sense to require a colorable claim of both before subjecting the Government to discovery." *Id.* at 947.

The Second, Fourth, Sixth, and Eighth Circuits have also held that, in order to obtain discovery, a defendant must make a threshold showing that others similarly situated have not been prosecuted. *United States* v. *Fares*, 978 F.2d 52, 59-60 (2d Cir. 1992) (discovery properly denied because defendant did not introduce evidence that there were "large numbers of similarly situated persons known to the government who had not been prosecuted"); *United States* v. *Greenwood*, 796 F.2d 49, 52-53 (4th Cir. 1986) (discovery properly denied because defendant failed to make non-frivolous showing that others who were similarly situated had not been prosecuted); *United States* v. *Peete*, 919 F.2d 1168, 1176 (6th Cir. 1990) (discovery properly denied because defendant, "aside from his own self-serving affidavit and an affidavit from his counsel, did not point to any evidence that others similarly situated were not prosecuted"); *United States* v. *Parham*, 16 F.3d 844, 847 (8th Cir. 1994) (discovery properly denied because, "[w]here a defendant cannot show anyone in a similar situation who was not prosecuted, he has not met the threshold point of showing that there has been selectivity in prosecution").

Indeed, even the Ninth Circuit had, before the decision in this case, correctly required defendants

seeking discovery from the government to introduce "solid, credible" evidence that other similarly situated offenders had not been prosecuted in order to obtain discovery on a claim of selective prosecution. *Bourgeois*, 964 F.2d at 939. In light of the Ninth Circuit's abandonment of that principle, review is warranted to resolve the conflict in the circuits created by the decision in this case.

4. The holding in this case has a substantial adverse impact on the administration of criminal cases in the Ninth Circuit. Because defendants have a large incentive to put up threshold procedural roadblocks that postpone a criminal trial, the decision in this case has spawned, and will continue to spawn, numerous motions arguing that particular exercises of prosecutorial discretion are tainted by discriminatory motives, and that significant discovery into the prosecutors' files is warranted. Responding to those motions entails disruption, delay, and burden, all of which come at the expense of the investigation and prosecution of crime. Racial discrimination in the administration of the law is intolerable and unconstitutional, and the United States' policy is that the enforcement of the criminal law must be free from invidious discrimination. Although courts have a duty to enforce equal protection guarantees in the face of a properly supported claim of selective prosecution, the Ninth Circuit's novel approach goes far beyond what is necessary or appropriate for that purpose.

Until now, there have been only a handful of circuit court decisions authorizing discovery on a claim of selective prosecution. App., *infra*, 61a n.16 (discussing cases). As a prior Ninth Circuit decision explained, because of the high threshold showing re-

quired by the courts, it was the "rare defendant" who was able to present a "sufficiently strong case of selective prosecution to merit discovery of government documents." *Bourgeois*, 964 F.2d at 939. The decision below establishes a new regime in which intrusive judicial inquiries into exercises of prosecutorial discretion and substantial delays in determining a defendant's innocence or guilt could easily become routine in a wide range of cases.

For example, the showing that was made below could be made by every single black criminal defendant charged with dealing in crack in the Central District of California. The decision below thus immediately places the entire crack enforcement program for that District under a cloud. As a practical matter, the Central District United States Attorney's Office must be prepared to justify its exercise of prosecutorial discretion to a federal district judge each time it prosecutes a black defendant for dealing in crack. Numerous discovery motions have been filed in the Central District of California,[2] and the effort to respond to those

[2] Selective prosecution discovery motions have been filed in the following crack cases. *United States* v. *Henry*, No. CR 94-628-CBM (C.D. Cal.); *United States* v. *Turner*, No. CR 94-649-JSL (C.D. Cal.); *United States* v. *Jones*, No. CR 94-820-JSL (C.D. Cal.); *United States* v. *Brown*, No. CR 94-821-DWW (C.D. Cal.); *United States* v. *Featherstone*, No. CR 94-822-SVW (C.D. Cal.); *United States* v. *Tyree*, No. CR 94-823-DT (C.D. Cal.); *United States* v. *Banks*, No. CR 94-906-JSL (C.D. Cal.); *United States* v. *Brown*, No. CR 95-431-HLH (C.D. Cal.); *United States* v. *Sanders*, No. CR 95-433-HLH (C.D. Cal.).

motions has required the expenditure of significant resources.[3]

Moreover, the decision below is likely to have a similar effect on United States Attorney's Offices throughout the Ninth Circuit. According to the most recent figures compiled by the United States Sentencing Commission, for the year beginning October 1, 1993, and ending September 30, 1994, more than 90% of those sentenced for dealing in crack nationwide were black. United States Sentencing Comm'n, *Annual Report 1994*, at 107 (Table 45). It is therefore reasonable to expect that the Public Defender in almost every Ninth Circuit district could make a showing that would justify discovery under the decision below.

Nor are the effects of the decision limited to crack prosecutions. Because of the proximity of California to Mexico and other Spanish-speaking countries, Hispanic defendants prosecuted in California for illegal reentry following deportation, in violation of 8 U.S.C. 1326, have been able to show that most such defendants are Hispanic—a showing that may well, under the court's en banc decision, support discovery

[3] In one case, more than 1,000 hours of work by attorneys, support personnel, and law enforcement officers were required to collect data and prepare affidavits to respond to a discovery motion. The prosecution of the case was delayed by more than four months by consideration of the discovery motion, before it was ultimately denied. See *United States* v. *Henry*, No. CR 94-628-CBM (C.D. Cal. June 26, 1995) (Order). The opposition filed in *Henry* formed the basis for equally substantial responses filed in several other crack cases. *United States* v. *Turner*, No. CR 94-649-JSL (C.D. Cal.); *United States* v. *Jones, et al.*, No. CR 94-820-JSL (C.D. Cal.); *United States* v. *Banks*, No. CR 94-906-JSL (C.D. Cal.).

on claims that the government has engaged in selective prosecution in enforcing United States immigration laws. Indeed, based on such slender showings, discovery has been ordered in numerous illegal reentry cases, requiring the government to produce the criminal history record, prior deportation status, and place of origin for all defendants prosecuted for illegal reentry since 1991 in the entire Ninth Circuit.[4] The decision in this case will exacerbate the burdens imposed by such motions.

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[4] *United States* v. *Fernandez-Pardo*, No. CR 94-146-DT (C.D. Cal.), remanded for reconsideration in light of *Armstrong*, No. 94-50401 (July 19, 1995); *United States* v. *Zapeda-Castro*, No. CR 94-399-DT (C.D. Cal.), remanded for reconsideration in light of *Armstrong*, No. 94-50402 (July 19, 1995); *United States* v. *Gomez-Lopez*, No. CR 94-639-RMT (C.D. Cal.), appeal pending, No. 94-50548; *United States* v. *Cortez-Lopez*, No. CR 94-531-DT (C.D. Cal.), appeal pending, No. 94-50553; *United States* v. *Hernandez-Rosas*, No. CR 94-674-DT (C.D. Cal.), appeal pending, No. 94-50592; *United States* v. *Flores-Huizar*, No. CR 95-101-TJH (C.D. Cal.), appeal pending, No. 95-50299; *United States* v. *Arenas-Tosquento*, CR 95-380-DT (C.D. Cal.); *United States* v. *Contreras-Juarez*, CR 95-383-RMT (C.D. Cal.).

Moreover, in a published order, the Ninth Circuit recently remanded for reconsideration in light of *Armstrong* a Section 1326 case in which discovery was denied by the district court. *United States* v. *Rendon-Abundez*, No. 94-50352 (July 13, 1995), slip op. 8319, 8320 (application for stay of mandate pending). Since then, the Ninth Circuit, in unpublished orders, has remanded 17 other cases for reconsideration in light of *Armstrong*. *United States* v. *Gutierrez-Salas*, No. 94-50411 (July 18, 1995); *United States* v. *Altamirano*, No. 94-50469 (July 18, 1995); *United States* v. *Ibarra-Madero*, No. 94-50598 (July 18, 1995); *United States* v. *Mendoza-Villalobos*, No. 94-50566 (July 18, 1995); *United States* v. *Campos-Oropeza*, No. 94-50595 (July 18, 1995); *United States* v. *Chavez-Flores*, No. 94-50612 (July 20, 1995); *United States* v. *Fernandez-Pardo*, No. 94-50401 (July 19, 1995); *United States* v. *Gonzalez-Ruiz*, No. 94-50408 (July 20, 1995); *United States* v. *Guerra-Ramos*, No. 94-50237 (July 19, 1995); *United States* v. *Gutierrez-Hernandez*, No. 94-50555 (July 19, 1995); *United States* v. *Hermosillo-Rodriguez*, No. 94-50501 (July 20, 1995); *United States* v. *Hernanez-Azamar*, No. 94-50605 (July 20, 1995); *United States* v. *Lua-Chavez*, No. 94-50528 (July 19, 1995); *United States* v. *Martinez-Sanchez*, No. 94-50466 (July 19, 1995); *United States* v. *Sanchez-Portillo*, No. 94-50257 (July 19, 1995); *United States* v. *Torres-Herrera*, No. 94-50233 (July 19, 1995); *United States* v. *Zapeda-Castro*, No. 94-50402 (July 19, 1995). In view of those latter dispositions, it seems likely that the Ninth Circuit will eventually remand for reconsideration all Section 1326 cases in which district courts ruled on discovery motions before the issuance of the en banc opinion in *Armstrong*. There are at least eight such cases pending in the Ninth Circuit from the Central District of California alone. *United States* v. *Pedraza-Murillo*, No. 94-50560; *United States* v. *Lemus-Garcia*, No. 95-50064; *United States* v. *Melgar-Galvez*, No. 95-50087; *United States* v. *Valenzuela-Cervantes*, No. 95-50117; *United States* v. *Gomez-Lopez*, No. 94-50548; *United States* v. *Cortez-Lopez*, No. 94-50553; *United States* v. *Hernandez-Rosas*, No. 94-50592; *United States* v. *Flores-Huizar*, No. 95-50299.

Discovery requests in other classes of cases are not far behind. According to the Sentencing Commission, for the year beginning October 1, 1993, and ending September 30, 1994, 93.4% of the defendants sentenced for trafficking in LSD, 100% of those sentenced for antitrust violations, and 91.4% of those sentenced for pornography and prostitution offenses were white. *Annual Report*, *supra*, at 41, 107 (Tables 13, 45). In many offense categories, more than 90% of those sentenced were men. *Id.* at 41 (Table 13). In all of those cases, the defendants will be able to show that members of a group to which they belong have been

prosecuted. Even without a showing that similarly situated members of another group were not prosecuted, the Ninth Circuit's ruling may well authorize the provision of substantial discovery.

The danger in allowing discovery based on the kind of insubstantial showing made here is evident. "If more than this quantum of evidence is not required, district courts too often and unnecessarily could become immersed in the workings of a coordinate branch of government, to the benefit of neither." App., *infra*, 84a (panel opinion). And as the dissent in this case added, if the decision below remains the law, "[r]esources intended for controlling crime, one of the nation's most pressing concerns, will be chasing statistics instead." *Id.* at 67a. Because those serious harms to the criminal justice system are unjustified by any legitimate interest, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 93-50031, 93-50057

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CHRISTOPHER LEE ARMSTRONG,
AKA: CHRIS ARMSTRONG, DEFENDANT
and
ROBERT ROZELLE, AARON HAMPTON;
FREDDIE MACK; SHELTON AUNTWAN MARTIN,
DEFENDANTS-APPELLEES

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CHRISTOPHER LEE ARMSTRONG,
AKA: CHRIS ARMSTRONG, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Central District of California

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[Filed Mar. 2, 1995]

Before: WALLACE, Chief Judge, BROWNING, SCHROEDER, FLETCHER, D.W. NELSON, CANBY, REINHARDT, LEAVY, RYMER, T.G. NELSON, and KLEINFELD, Circuit Judges.

Opinion by Judge REINHARDT; Concurrence by Judge WALLACE; Dissent by Judge RYMER.

REINHARDT, CIRCUIT JUDGE:

We review this case en banc to resolve a conflict in our circuit over the proper standard for determining whether an adequate showing has been made by a defendant seeking discovery in connection with a selective prosecution charge. The conflict arises from two cases filed within days of each other that adopted different approaches to this question. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1302 (9th Cir.1992), held that the government could be ordered to provide discovery only upon a "prima facie showing that wrongful discrimination is probably taking place." By contrast, *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir.1992), stated that a prima facie showing was not necessary. Instead, *Bourgeois* adopted a "colorable basis" test. *Id.* We conclude that the colorable basis standard better accommodates the competing concerns implicated by discovery in selective prosecution cases.

We have jurisdiction to hear the government's appeal only because the district judge ordered dismissal of the defendants' indictments. 18 U.S.C. § 3731. Under 18 U.S.C. § 3731, the government is not permitted to appeal the discovery ruling itself. The statute does, however, permit the government to appeal the dismissal of indictments. Here, the district judge imposed dismissal as a sanction for the government's failure to comply with her discovery

order. That action resulted in an appealable order under § 3731.

The government does not question the reasonableness of the particular sanction imposed. In fact, it was the government itself that suggested dismissal of the indictments to the district court so that an appeal might lie. On appeal, the government argues only that no sanction at all should have been ordered, contending that the district judge abused her discretion in requiring discovery. As a result, the appeal allows us to reach the merits of the underlying discovery issue.

The district judge stayed execution of the dismissal order pending the outcome of this appeal. It appears from the record that she issued the stay so that the defendants would not be released prior to our ruling on the validity of that order. Thus, while our opinion is devoted to a discussion of the discovery order, ultimately we rule on the validity of the order dismissing the indictments.

In sum, the appeal is properly before us only because the government knowingly accepted the consequence of opting for an immediate appeal rather than complying with the discovery order. That consequence is that, if we affirm, the dismissal of the indictments must now be implemented unless the order dismissing them is further stayed pending review by the Supreme Court. It is too late for the government to change its mind and comply with the discovery order. Were that not the rule, we would simply be permitting appeals of discovery orders under the guise of reviewing dismissal orders that were either only tentative or were never intended to take effect. In either case, we would not have jurisdiction over the appeals under § 3731.

Because we hold that the defendants here satisfied the colorable basis requirement, we affirm the district court's dismissal of the indictments.

I.

In April of 1992, defendants Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle were charged with federal offenses for their alleged involvement in the distribution of cocaine base, known colloquially as "crack" or "rock". The charges stemmed from an investigation conducted under the direction of a joint state and federal task force comprised of detectives from the Inglewood Narcotics Division and agents from the Bureau of Alcohol, Tobacco, and Firearms.

All five defendants were charged with conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the defendants were also charged with selling cocaine base under 21 U.S.C. 841(a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924(c). The decision to charge the defendants with federal rather than California state offenses was significant. Federal law imposes a minimum sentence of 10 years and a maximum of life for those convicted of selling more than 50 grams of cocaine base. 21 U.S.C. § 841(b). By contrast, under California law, the minimum sentence for that offense is three years and the maximum is five. Cal.Health & Safety Code § 11351.5 (Deering 1993). All five defendants are black.

On July 20, 1992, defendant Martin filed a Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution. He claimed that the decision to prosecute him on federal charges was based on his race. The other four defendants timely joined the motion which was heard on September 8, 1992.

To support the motion for discovery, the defendants offered into evidence a study of every case involving a charge under 21 U.S.C. §§ 841 and 846 that the Federal Public Defender's Office for the Central District of California had *closed* in 1991. The study showed that in all 24 such cases the defendants had been black. At the hearing, counsel for the government responded to the judge's request for an explanation of these numbers by stating: "I would have no explanation for that. But certainly I can say that there is no racial motivation of any sort that I am aware of as to why we brought this case versus any others."

The district court granted the motion for discovery. Specifically, the district judge ordered the government to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases to the federal court.

The government chose not to comply with the discovery order and instead filed a motion for reconsideration. In support of its motion, the government provided a list of all defendants charged with violations of 21 U.S.C. §§ 841 and 846 over a three-year period (without any racial breakdown) as well as declarations by three law enforcement officers and two Assistant United States Attorneys. The declarations collectively provided four explanations for the study's implication that the overwhelming bulk of federal prosecutions for cocaine base offenses targeted black defendants.

First, the declarations asserted that socio-economic factors led certain ethnic and racial groups to be particularly involved with the distribution of certain drugs and that blacks were particularly involved in the Los Angeles-area crack trade. Second, the declarations contended that during the three-year period, seven non-black defendants had been prosecuted on federal cocaine base charges, although it appears that all of them were members of racial or ethnic minority groups. (Later, the government identified four more non-black defendants who had been prosecuted during that three-year period, all of whom were also persons of color.) Third, the declarations asserted that many blacks had been tried in state court for cocaine base offenses. Fourth, the declarations contained a description of some of the general factors on which federal prosecutors based their charging decisions for crack-related offenses. The factors specifically referred to were the strength of the evidence, the deterrent value of bringing the charge, the federal interest in the prosecution, and the suspect's criminal history. The declarations also referred to other unidentified "race-neutral" criteria.

In response, the defendants bolstered the statistical study they had submitted at the initial hearing with additional declarations. First, one of the defendant's counsel stated that she had spoken with a halfway house intake coordinator who told her that in his experience treating cocaine base addicts, whites and blacks dealt and used the drug in equal numbers. Second, another defense attorney asserted that his experience and conversations with judges, lawyers, and defendants led him to conclude that many non-blacks were prosecuted for cocaine base offenses in state court. Finally, the defendants submitted an article from the *Los Angeles Times* discussing the

disparate federal sentences imposed for cocaine base and regular cocaine offenses.

District Judge Consuelo Marshall denied the motion for reconsideration. She stated her reasons for the denial at the hearing: "The statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena."

The government again chose not to comply with the discovery order. After some discussion among the parties and the court, the defendants moved to dismiss the indictments as a sanction. The district judge dismissed the indictments, but stayed the order pending appeal. The government timely appealed.

II.

We review for abuse of discretion a district court's decision to order discovery. *United States v. Bourgeois*, 964 F.2d 935, 937 (9th Cir.1992). We have previously stated that, "[t]he task of safeguarding the rights of criminal defendants ultimately rests with the experienced men and women who preside in our district courts." *United States v. Balough*, 820 F.2d 1485, 1491 (9th Cir.1987). District judges are well situated to observe possible discrimination in the government's charging decisions. They have direct experience with the policies and practices of the United States Attorneys in their districts and have the opportunity to discern patterns of discrimination.

See *United States v. Redondo-Lemos*, 955 F.2d 1296, 1298, 1302 (9th Cir.1992).

We are mindful that it is only a discovery order that we are reviewing. To obtain discovery, the defendants need not prove impermissible discrimination. To order discovery, the district court need not decide that the defendants have in fact demonstrated the existence of selective prosecution. If such conclusive determinations could be made without discovery, there would be no need for discovery in the first place. Thus, the evidence necessary to obtain a discovery order when a charge of selective prosecution has been made is obviously substantially less than that needed to prove the charge itself.

We conclude that discovery may be ordered when the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred. The existence of a colorable basis must be judged in light of all the evidence presented to the district court and not simply that offered by the defendant. "The United States Attorney must be given the chance to make whatever showing [he] deems appropriate to dispel the district judge's concerns." *Redondo-Lemos*, 955 F.2d at 1302; see also Bourgeois, 964 F.2d at 941 (considering government's response). However, if the government fails to make a showing sufficient to dispel those concerns, then a colorable basis remains even though the government has provided some evidence in response.

The colorable basis standard is met by "some evidence tending to show the essential elements of the claim." *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir.1990). Of course, "some evidence" means the showing must be more than frivolous and based on more than conclusory allegations. As we stated in Bourgeois,

> to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors.

964 F.2d at 939.

Because the meaning of "colorable basis" first articulated in *Bourgeois* has proved elusive, we believe it necessary to explain the standard more fully. In particular, we address here three aspects of the showing needed for discovery in a selective prosecution claim that may be unclear after *Bourgeois* and concerning which the parties strongly disagree.

First, *Bourgeois* stated that the colorable basis standard sets a "high threshold" that should rarely justify discovery. *Id.* at 940. This characterization of the standard appears to conflict with the opinion's earlier conclusion that the showing needed for discovery is less than that needed for a prima facie case. *Id.* at 939. In describing the colorable basis test as setting a "high threshold" that would be met only infrequently, our opinion resulted in more confusion than clarification. The "high threshold" language in Bourgeois appeared to set an artificially onerous burden in such claims. The inclusion of that language in our opinion was in error.

Second, *Bourgeois* did not adequately explicate what showing is necessary to create a colorable basis for believing that particular prosecutorial conduct has discriminatory effects and is motivated by a discriminatory purpose. To succeed on a claim of selective prosecution the defendant must show both that the prosecutorial selection "had a discriminatory

effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985). However, *Wayte* made clear that "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Id.*

A direct showing of discriminatory intent is not always necessary to make out an equal protection claim; under ordinary equal protection standards, a claimant may prove discriminatory purpose circumstantially. *See Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 563-64, 50 L.Ed.2d 450 (1977). A circumstantial showing of intent may be based on evidence of discriminatory effects. "Evidence of the discriminatory impact of decisions is one sort of circumstantial evidence supporting an inference of . . . intent." *Diaz v. San Jose Unified School District*, 733 F.2d 660, 662 (9th Cir.1984) (en banc), *cert. denied* 471 U.S. 1065, 105 S.Ct. 2140, 85 L.Ed.2d 497 (1985); *see also Batson v. Kentucky*, 476 U.S. 79, 93, 106 S.Ct. 1712, 1721, 90 L.Ed.2d 69 (1986) ("Circumstantial evidence of invidious intent may include proof of disproportionate impact.").

Moreover, we have previously stated that statistical disparities alone may suffice to provide the evidence of discriminatory effect and intent that will establish a prima facie case of selective prosecution. *See Redondo-Lemos*, 955 F.2d at 1301-02.[1] Because

[1] To the extent that *United States v. Gutierrez* conflicts with this proposition by holding that a statistical disparity does not satisfy the effect prong of a prima facie showing of selective prosecution, we overrule it. *See United States v. Gutierrez*, 990 F.2d 472, 476 (9th Cir.1993) (implicitly holding that a significant statistical disparity will not alone satisfy the

the standard for a discovery showing is lower than that for a prima facie case, *Bourgeois*, 964 F.2d at 939, we hold that inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim.

Finally, Bourgeois did not sufficiently emphasize that judges considering discovery requests on selective prosecution charges should bear in mind the evidentiary obstacles defendants face. The notorious difficulty of proving a race discrimination claim is particularly acute in the context of selective prosecution claims. *Cf. Wayte*, 470 U.S. at 624, 105 S.Ct. at 1539 (Marshall, J., dissenting). The broad discretion that prosecutors possess over charging

discriminatory effect prong of the prima facie case in selective prosecution claims). Accordingly, we reject the suggestion in the concurrence that while a defendant need not show that " 'others similarly situated' have not been prosecuted" under a colorable basis test, he must do so in order to establish a prima facie case. [P. 30a, *infra*] (Wallace, C.J., concurring). Finally, the suggestion in the dissent that this en banc court has no authority to overrule *Gutierrez* is simply wrong. Aside from the fact that there is no legal basis for questioning an en banc court's authority to overrule a case in order to "secure or maintain the uniformity of [our] decisions," Fed.R.App.P. 35(a)(1), and the fact that our conclusion that it is necessary to do so in this case is binding on future panels whether or not they agree with that determination, here the reason we overrule *Gutierrez* is clear. There is a direct and interdependent relationship between what is needed to establish a colorable basis and what is needed to establish a prima facie case. As the dissent acknowledges, "[d]iscovery cannot be unhinged from the merits." [P. 49a, *infra*] n. 10 (Rymer, J., dissenting). Our examination of the prima facie standard is a necessary step, therefore, in our determination of what constitutes a colorable basis.

decisions means that they alone will often possess the only information that would demonstrate such discrimination. *Id.* As a result, the data necessary to a showing of selective prosecution are far less accessible to the defendants than to the government.

Defendants attempting to show a colorable basis that warrants discovery can only be expected to make good faith efforts to obtain whatever evidence is readily available, as well as to provide whatever evidence is already in their possession. *Cf. Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 563-64 (a court assessing an equal protection claim based on race discrimination must engage in "a sensitive inquiry into such circumstantial and direct evidence of intent *as may be available.*" (emphasis added)). Defendants are not required to present sophisticated regression analyses closely following the dictates of the scientific method nor a "smoking gun" that irrefutably demonstrates the existence of prosecutorial bias. Nor are defendants required to compile facts which are not easily obtainable by them, such as the racial breakdown and offense characteristics of defendants represented by other counsel.

The colorable basis standard we enunciate today brings our approach to discovery in selective prosecution claims more in line with that of the other circuits. While all the circuits have considered the issue, only four apply a stricter test. Moreover, each of those four requires a prima facie showing,[2] a

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[2] *See United States v. Penagaricano-Soler*, 911 F.2d 833, 838 (1st Cir.1990); *St. German of Alaska Eastern Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1095 (2d Cir.1988); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir.1978); *United States v. Parham*, 16 F.3d 844, 847 (8th Cir.1994) (stating that the "burden is a heavy one").

standard which even the dissent rejects as being too high. *See Post* at 1526-27. By contrast, the "colorable basis" test we set forth mirrors the approach taken by the Third, Sixth, Seventh, Tenth, and D.C. Circuits. Each of those circuits permits discovery when the defendants introduce some evidence tending to show the essential elements of selective prosecution and the government fails to explain it adequately.[3] Finally, our approach is certainly more akin to that favored by the two circuits that have adopted a version of the non-frivolousness standard advocated by the dissenters in *Wayte*.[4]

The colorable basis standard not only best reflects the prevailing view of the law, but it also effectively

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[3] *See In Re Grand Jury*, 619 F.2d 1022, 1030 (3d Cir.1980) (holding that "some credible evidence must be adduced" (citation omitted)); *United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir.1989) (adopting "some evidence" test); *Heidecke*, 900 F.2d at 1158 (7th Cir.) (same); *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir.1992) (approving approach adopted by the Sixth Circuit in Adams); *Attorney General of United States v. Irish People, Inc.*, 684 F.2d 928, 948 (D.C.Cir.1982) (explaining that "some evidence tending to show the essential elements of [the selective prosecution claim]" is consistent with a "colorable showing" (internal quotation marks and citation omitted)); *see also United States v. Washington*, 705 F.2d 489, 494-95 (D.C.Cir.1983) (noting that the district court permitted discovery under the "colorable showing" test but affirming the denial of the selective prosecution claim).

[4] *See United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir.), *rev'd and vacated in part on other grounds*, 836 F.2d 1312 (1988) ("colorable entitlement" met by evidence that is non-frivolous and raises a reasonable doubt); *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir.1986) (holding that allegations that raise "at least a legitimate issue" of selective prosecution merit discovery unless the "government's explanation" is convincing).

accommodates the twin but conflicting concerns that discovery in selective prosecution claims implicates. On the one hand, selective prosecution claims call into question the very integrity of our system of criminal justice by suggesting that prosecutorial decisions have been " 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' "*Wayte v. United States*, 470 U.S. at 608, 105 S.Ct. at 1531 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1978)) (further quotation omitted). This concern compels district courts to be vigilant in ensuring that impermissible prosecutorial biases do not remain hidden in files kept from public view.

On the other hand, selective prosecution claims invite the courts to investigate the discretionary charging decisions of executive branch officials that traditionally have not been subject to strict oversight. Separation of powers concerns and the systemic costs that such judicial intrusions entail caution against setting the threshold showing for discovery so low that even frivolous assertions of prosecutorial bias may require the government to lay bare its files. *See Wayte*, 470 U.S. at 607, 105 S.Ct. at 1530.

The colorable basis standard ensures that the government will not be called to answer for its charging decisions as a result of frivolous and unwarranted allegations. At the same time, the standard ensures that defendants will not face unjustified hurdles at the discovery stage that will preclude them from demonstrating the existence of

actual discrimination in the selection of defendants for criminal prosecution.[5]

III.

Here, the defendants have presented sufficient evidence to provide a colorable basis for believing that the government has engaged in discriminatory prosecution. They have provided statistical evidence suggesting that blacks are disproportionately charged with federal crack offenses. The government has not offered evidence in response that is sufficiently persuasive to refute the inference that may reasonably be drawn from the statistics. Thus, the district judge is not precluded from determining in her discretion that a colorable basis for selective prosecution has been shown.

A.

The study conducted by the Office of the Federal Public Defender provides a colorable basis for concluding that invidious discrimination may have occurred. The study found that, of all cocaine base

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[5] We do not consider here the question of whether or under what circumstances a judge may rely on facts within his own experience in satisfying the colorable basis standard. *See Redondo-Lemos*, 955 F.2d at 1300-03. That question is not before us. We conclude only that whatever the form of the evidence and whatever the source, the colorable basis standard is applicable. We disapprove any contrary statement in *Redondo-Lemos*.

We note, however, that we review certain types of rulings under an abuse of discretion or clearly erroneous standard rather than de novo because of the trial court's " 'experience with the mainsprings of human conduct.' " *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.1984) (en banc) (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198-99, 4 L.Ed.2d 1218 (1960)).

cases closed by the Office in 1991, 24 out of 24 involved black defendants. To be sure, such a small number of cases does not conclusively establish either of the elements of selective prosecution. However, the fact that every single crack defendant represented by the Federal Public Defender in all cases that terminated during 1991 was black provides a colorable basis for believing that the challenged prosecutorial policies are driven by discriminatory motives and yield discriminatory effects. As a result, the study raises enough of a question to justify further inquiry.

The evidence of discriminatory prosecution in this case is much stronger than the evidence we held insufficient in *Bourgeois*. In that case, the defendants argued that they were entitled to discovery based on a showing that all prosecutions for firearms violations stemming from a *two-day* police operation involved black defendants. The district court rejected the defendants' claims, holding in part that two days was far too short a period to serve as a basis for analyzing the overall conduct of a prosecutorial agency. Instead of focusing on the single operation that resulted in the arrests of *Bourgeois* and his associates, the district court looked instead to all firearms prosecutions over a two-year span. The court found that the government had prosecuted over 140 people during that period for the same crimes as those for which *Bourgeois* was prosecuted. Because Bourgeois "did not allege that all or most of these cases involved blacks," *Bourgeois*, 964 F.2d at 940, the district court concluded that he had not established a colorable basis to justify discovery. We held that the district court did not abuse its discretion in refusing to order discovery in these circumstances. *See id.* at 941.

The evidence offered in *Bourgeois* involved only one operation, over a single two-day period. The Federal Public Defender study, by contrast, involved an agency that represents a significant percentage of all federal criminal defendants, and it involved all cases closed over a significant period of time. Common sense indicates that such a study provides a much stronger basis for reasonably inferring invidious discrimination than does an analysis of only a single, short police operation. *See id.* ("[T]he relevant inquiry is the history of prosecutions over a reasonable period of time.").

The Federal Public Defender study showed that the largest single provider of legal services to federal criminal defendants in the Central District of California did not close a single case involving a crack charge against a non-black defendant in all of 1991. Although the number of cases is too small to resolve the issue either way, it certainly constitutes "some evidence tending to show the essential elements" of the defendants' claim.

The district judge based the discovery order on precisely this reasoning. "I think the number is adequate that would at least require the Government to provide some explanation. The time period is such that would require some explanation. The charges are the same or similar, and the race is the same in each case." A district judge's decision to permit further inquiry into the issue based on such an analysis cannot fairly be considered to be an abuse of discretion.

B.

In determining whether a colorable basis for discovery exists, the district judge cannot discount the government's attempts to explain the evidence

introduced by the defendant. A colorable basis must still exist after all the evidence presented by both sides has been considered. However, in evaluating the adequacy of the government's response, the judge may exercise considerable discretion. We, in turn, give broad deference to the district court's determinations. *See Bourgeois*, 964 F.2d at 937.

Here, the government proffers three responses to the defendants' showing. First, the government challenges the defendant's study and contends that its limited scope could not reasonably suggest any race-based disparity in the treatment of crack offenders by federal prosecutors. Second, the government contends that even if the defendants' showing did suggest such a racial disparity, socioeconomic forces and race-neutral charging criteria rather than prosecutorial discrimination explain that disparity. Finally, the government contends that the defendants made no showing of discriminatory purpose. The district judge did not abuse her discretion in concluding that these responses do not effectively dispel the colorable basis for discrimination that the defendants' showing created.

The government contends that the study does not demonstrate any discriminatory effect because it shows only that blacks have been prosecuted, not that others of different races and similarly situated have not. But a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated. He need only provide a colorable basis for believing that other similarly situated persons have not been prosecuted. The study introduced by defendants clearly satisfies this requirement. "At a threshold level, whether or not there is a significant disparity in the treatment of classes of defendants can normally be determined on

the basis of statistical evidence, without reference to the underlying facts of individual cases." *Redondo-Lemos*, 955 F.2d at 1301.

Given the prevalence of all kinds of drugs throughout our community, at least some crack distributors are likely to be non-blacks. We must start with the presumption that people of all races commit all types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group. These presumptions and premises are, of course, not conclusive. Still, absent some compelling contrary evidence, we must assume that crime knows no exclusive race or creed.[6]

Here, the government's own showing in and of itself provides evidence that similarly situated potential defendants of other races do exist—in other words that non-blacks also commit violations of 21 U.S.C. §§ 841 and 846. Thus, here the government does not take the unsupportable position that *only* blacks commit the crimes with which the defendants are charged.

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[6] Accordingly, the dissent's repeated calls for a "comparison pool" simply miss the point. The fact that evidence of similarly situated persons who were not prosecuted was submitted in other kinds of selective prosecution claims is of no significance in the context of a selective prosecution case based on race. Certainly, no "comparison pool" is necessary when the record contains statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted. Were we to conclude otherwise, we would be accepting unwarranted racial stereotypes. Of course, as we explain, the government is free either to show that the record is incomplete or that a reasonable explanation exists for the statistical evidence. That is what the government failed to do here.

The fact that the government has identified some non-black crack offenders who have been *charged* with federal crimes, however, does not undermine the accuracy or the force of the study. The government has not identified a single non-black cocaine base case *closed* by the Federal Public Defender's Office (or anyone else) during the study's one-year time period. Instead, the government introduced evidence to show that over a three-year period some federal cocaine base prosecutions of members of other minorities did occur. None of the cases, however, fell within the parameters of the study. As a result, the government's identification of these cases fails to undermine the accuracy of the study in any respect.[7]

In the absence of a response undermining the study's accuracy, the district judge appropriately gave credence to the defendants' showing that a study of federal cocaine base cases *closed* by the federal public defender over a particular period of time showed that *only* black defendants were involved. These results are highly suggestive of the fact that blacks constitute at the very least a disproportionate number of those charged with federal crack offenses.

Of course, the government could have demonstrated that the study's results were a mere statistical fluke and that pure chance explains the fact that the only cases closed during the relevant period were

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[7] The dissent complains that the study looks at all cases closed and suggests that it would have been preferable to look at all cases opened. We fail to see the difference. While there may be better ways to conduct a statistical study, we think that examining closed cases is not an unreasonable one. In this regard, we note that the factor used to choose the cases examined in the study—whether the case had been closed—was a factor independent of and not correlated with race.

those involving black defendants. But the government failed to do that as well. Instead, the government's evidence showed only that during a three-year period in which several thousand people were charged with violations of §§ 841(a)(1) and 846, it was only able to identify 11 non-black defendants charged with crack cocaine offenses under these statutes, all of whom were members of racial or ethnic minority groups. The identification of a handful of non-black crack offenders (all of whom also happened to be persons of color) does nothing to suggest that the study's inference of race-based disparity is untenable. Indeed, the fact that the government could identify so few non-blacks charged with federal crack offenses is entirely consistent with the study's inference that those charged federally with cocaine base offenses belong virtually exclusively to one racial group.

Of course, in finding that the Federal Public Defender study provides a colorable basis for concluding that discriminatory prosecution may have occurred, we do not determine that the study establishes that the United States Attorney has engaged in such invidious conduct. Rather, it serves only as some evidence that tends to show that the United States Attorney may be engaging in discrimination and suggests that further inquiry on the subject is warranted. That is precisely the course the district court took here by permitting discovery, and it did not abuse its discretion in doing so.

The government argues in the alternative that even if the defendants' evidence does suggest a disparity in the treatment of crack offenders on the basis of race, that disparity can be explained by reasons apart from the existence of discriminatory prosecution. Explanations for apparent racial dis-

parities can in some circumstances effectively explain evidence that on its own would provide a basis for ordering discovery. For example, in *Bourgeois*, discovery was denied largely because the government had offered a compelling explanation of why all those arrested in the two-day sweep were black. The government there explained that the sweep had focused on a particularly dangerous criminal gang of which all members were black. The defendants had made no showing that an overwhelming majority of gang prosecutions focused on black defendants or that the two-day action was in any way representative of what occurred over a longer period. Thus, the government's response provided the court with a compelling explanation of why all those prosecuted during the sweep were black. *See Bourgeois*, 964 F.2d at 941.

In its attempt to explain the alleged disparity here, the government offers essentially two responses. Neither response is of a kind that we can hold adequate to dispel the defendants' showing of a colorable basis. First, the government asserts that blacks in fact commit crack related offenses in disproportionate numbers. As the district judge noted, this assertion is based only on the generalized statements of DEA agents and not expert sociological testimony. Moreover, the response does not speak to the inference that blacks are more frequently prosecuted for *federal* crack offenses than even their allegedly disproportionate involvement with the drug would justify.

The defendants additional submissions addressed the latter point. On the government's motion for reconsideration, the defendants introduced two declarations from defense attorneys that provided additional support for the conclusion that the

charging decisions may have been discriminatory. One declaration set forth a statement made by an intake coordinator at a Pasadena halfway house who said that, in his experience, there were an equal number of white and non-white users and dealers of crack. The other declaration was from David R. Reed, an experienced criminal defense attorney in the Central District. Reed stated that, in his experience as a federal criminal defense lawyer and as a director of the state court indigent defense panel, he had never handled, known of, or heard of a single federal crack cocaine case involving non-black defendants, but that he knew of many crack cocaine prosecutions against non-blacks in state court.[8]

The government's response that blacks are disproportionately involved in the crack trade is simply a non-sequitur. Even if it were true that blacks commit crack offenses in greater numbers than others, that fact would not explain why black violators are more likely than their non-black counterparts in the crack trade to be charged with a federal than a state offense. In short, the response simply does not undermine the inference from the evidence, including the Reed declaration, that a crack offender's race is a factor that prosecutors rely on in deciding whether to charge him with a *federal* offense. Precisely this gap in the government's explanation caused the district judge to believe discovery was needed. "[W]hat the court wants to

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[8] The government did not object to the admissibility of these declarations. As a result, the declarations constitute probative evidence. *N.L.R.B. v. International Union of Operating Engineers, Local Union No. 12*, 413 F.2d 705, 707-08 (9th Cir.1969) (holding that "[u]nobjected to hearsay is admissible and is of probative value in the district courts").

know is whether or not there is any criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is that criteria. That is the problem I think that needs to be addressed, because we do see a lot of the cases and one does ask why some are in state court and some are being prosecuted in Federal court, and if it's not based on race, what's it based on?"

Second, the government attempted to assure the court that its charging decisions had nothing to do with race. To dispel the inference that race plays a part in the charging decisions of federal prosecutors, the government provided the district court with a general description of some of the criteria it relies on in making such judgments. The government submitted a declaration from David C. Scheper, Assistant United States Attorney and Chief of the Major Crimes unit in the United States Attorney's Office for the Central District of California, in which he purported to delineate the criteria. "All charging decisions are made on the basis of whether a federal offense that meets this Office's guidelines has occurred, the overall strength of the evidence, the deterrence value and federal interest associated with the particular case, the criminal history of the suspects, and *other race-neutral criteria*." (emphasis added). It was well within the district court's discretion to conclude that the recitation by Mr. Scheper of these vague, generalized, and even unspecified criteria was insufficient to rebut the evidence submitted by the defendants. Just as defendants may not rely on conclusory assertions to meet the colorable basis test, the government may not

rely on its alleged use of amorphous criteria to explain a showing that satisfies the standard.[9]

Given the circumstantial evidence of discrimination that the statistical evidence provides, the government's simple assertion that it relies on unspecified race-neutral criteria cannot suffice to foreclose further inquiry. More in the way of concrete facts is necessary. Blanket denials of discrimination, though often (but not always) made in good faith, are to be expected in cases such as these. The availability of discovery must not turn on the unlikely event that a federal prosecutor will confess to private biases. As the district judge noted in assessing the government's denial of racist motivations, "I'm not sure we'd find anybody that would say [otherwise]."

Finally, we note that the government's contention that no evidence of discriminatory purpose has been shown is unavailing. As our earlier discussion makes clear, an unexplained race-based statistical disparity can itself be sufficient circumstantial evidence of discriminatory intent to justify discovery. Cf. *Redondo-Lemos*, 955 F.2d at 1301 (finding that such

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[9] The dissent misleadingly characterizes this declaration. *See Post* at 1522-23. The specific factors listed by the dissent and said to be applicable to the defendants in this case were never shown to be part of any federal charging criteria. As the district court ruled, the government failed to disclose the criteria used by the United States Attorney in deciding whether to prosecute drug offenses. Thus, the declaration did not "explain" why the decisions to prosecute the *Armstrong* defendants were "consistent with the guidelines." *Post* at 1522. Rather, the declaration merely *asserted* that they were. In short, the district court was provided with wholly inadequate information concerning the criteria set forth in the guidelines.

evidence may establish a prima facie case); United *States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir.), *rev'd and vacated in part on other grounds*, 836 F.2d 1312 (1988) (finding that circumstantial evidence of intent establishes a prima facie case). We conclude that the Federal Defender Study, analyzing as it did the cases closed over a full year period, provided such circumstantial evidence of intent as is required to be shown at the discovery stage.

C.

When all of the evidence is taken together, the defendants have established several "specific facts, not mere allegations, which establish a colorable basis" to believe that the government has engaged in selective prosecution. *Bourgeois*, 964 F.2d at 939. Moreover, the government has not explained the evidence of a colorable basis in a manner that would justify our holding that the district judge abused her discretion in concluding that further statistical inquiry and elaboration of governmental charging criteria was justified. A district judge observes countless prosecutions in the course of even a brief stay on the bench. There is no reason to believe that such judges are easily convinced that the prosecutors who appear before them on a daily basis may be carrying out discriminatory policies. When a district judge does find that there is evidence that reasonably permits one to find a colorable basis for concluding that race-based prosecutorial selection may have occurred, and when the government does not provide an explanation that persuasively undermines such a conclusion, a reviewing court should be reluctant to discount that judgment.

IV.

There are few claims as serious as the charge put forth by the defendants here—that the government has selected them for prosecution because of their race. Such claims deserve the most careful examination by the courts so that the prosecutorial power does not become a license to discriminate based on race. Discovery is the crucial means by which defendants may provide a trial judge with the information needed in order to determine whether a claim of selective prosecution is meritorious. There is no basis for concluding that Judge Marshall *abused her discretion* in trying to conduct a careful examination of the defendants' charges or in determining that the defendants made a *colorable* showing of discriminatory enforcement of the law. Judge Marshall acted properly by authorizing the defendants to inquire further into this issue. Her discovery order was clearly within her discretion. We affirm the sanction she imposed for the government's failure to comply. As a consequence, the dismissals of the indictments are

AFFIRMED.

WALLACE, Chief Judge, concurring:

This case requires us to set forth the appropriate test for determining whether a sufficient showing has been made to allow discovery in a selective prosecution claim. I thought we could all agree that this test should be the one that our court developed in *United States v. Bourgeois*, 964 F.2d 935 (9th Cir.) (Bourgeois,), *cert. denied*, — U.S. ——, 113 S.Ct. 290, 121 L.Ed.2d 215 (1992). There, we held that "to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors." *Id.* at 939. What divides us is whether that standard should be rewritten and its application to this case. I believe that the result the majority reaches is correct, and to that extent I concur. I write separately, however, to discuss why I do so.

I

The majority correctly points out that the dismissal of the indictment as a sanction for noncompliance with the discovery order creates the appealable order that gives us jurisdiction over this appeal. However, this does not mean that the dismissal must be interpreted to be with prejudice. For a dismissal to be with prejudice, "the prosecution must be forewarned" of that fact. *United States v. Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir.1979) (en banc), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980). While the government agreed to the sanction in this case in order to effectuate the appeal, it does not appear in the record before us that the government was forewarned of any sanction that would forbid further proceedings against the defendants.

II

Turning to the merits, the majority, in an attempt to "clarify" the *Bourgeois* standard, goes too far. *Bourgeois* held that "the discovery threshold should not be so high as to require establishment of a prima facie case." *Bourgeois*, 964 F.2d at 939. Thus, according to *Bourgeois*, even though the defendant must make some showing that the elements of a selective prosecution claim can be met, that showing is less than what is ultimately required to prove selective prosecution. *Bourgeois*, as written, is sufficient for us to decide the case before us.

Undeterred, however, the majority attempts to "clarify" this test by stating that the "'high threshold' language in *Bourgeois* appeared to set an artificially onerous burden" on discovery. While the formulation of the colorable basis test shows that the test is certainly not as "high" as that required to prove a prima facie case, neither is it as "low" as a nonfrivolous showing. The dissent's discussion to the effect that a high threshold "is appropriate because courts are ill equipped to assess a prosecutor's charging decisions, and oversight of prosecutorial decisions could undermine effective law enforcement" seems to me correct. To the extent that the majority opinion undermines this idea, I disagree, and align myself with the analysis of the dissent.

On the other hand, my agreement with the majority's result is supported by a very similar observation about our role as a federal appellate court. Just as the district court should be careful not to undermine effective law enforcement by constantly evaluating the prosecutor's charging decisions, so too should we, as an appellate court, not second-guess the ruling of a district court in a close case. We are able to carry

out this function by adhering to our standards of review.

When reviewing the district court's discovery ruling on a selective prosecution claim, we ask whether the district court abused its discretion. *Id.* at 937; *see also United States v. Bryan*, 868 F.2d 1032, 1035 (9th Cir.), *cert. denied*, 493 U.S. 858, 110 S.Ct. 167, 107 L.Ed.2d 124 (1989). What this means is that "[a]bsent a definite and firm conviction that the district court committed a clear error of judgment, we will not disturb the district court's decision." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.1990).

In this case, the defendant provided: (1) evidence that all 24 cocaine base cases closed in 1991 by the Federal Public Defender involved black defendants; (2) two additional affidavits stating that there are Caucasian cocaine base users and that the number of such users prosecuted in state court is greater than the number prosecuted in federal court; and (3) a Los Angeles Times article stating that federal cocaine base laws carry tougher sentences. The district court, applying the Bourgeois standard, found that a colorable basis had been met, and ordered limited discovery. Because the abuse of discretion standard permits the district court flexibility, I conclude we should not overturn that order in this case.

The dissent argues that, as a matter of law, the colorable basis test has not been met. This conclusion is driven largely by the fact that there has been no showing here that "others similarly situated" have not been prosecuted. I agree with the dissent that to establish a prima facie case, hard data about others similarly situated is necessary. Proving a prima facie case of selective prosecution requires proof: (1) that others similarly situated have

not been prosecuted, and (2) that the prosecution is based on an impermissible motive (discriminatory purpose or intent). *United States v. Gutierrez*, 990 F.2d 472, 475 (9th Cir.1993). To the extent the majority disagrees with this formulation, and discusses how the statistical evidence here might be sufficient to prove both effect and intent, I do not concur. But this is all beside the point at the discovery stage, where only some evidence, tending to show selective prosecution, is required. Where there is evidence of a large enough number of prosecutions directed at a single race over a sufficiently long period of time, eventually there becomes a point where that evidence is sufficient to establish a colorable basis of selective prosecution.

The language of the colorable basis standard does indicate that specific facts must exist to establish the basis for believing that "discriminatory application of law" and "discriminatory intent" are present. But without discovery, the contention that "others similarly situated" have not been prosecuted (a claim essential to the prima facie case) may be impossible to show. The evidence produced by the defense in this case presents a close question, and, had I been the district judge, I might well have concluded that it was insufficient to make out a colorable basis. Indeed, this en banc case might have resulted in a different outcome were we to review the district judge's decision de novo. I am unable, however, to conclude that the district judge abused her discretion in allowing limited discovery.

I therefore concur in the result reached by the majority.

RYMER, Circuit Judge, with whom Circuit Judges LEAVY, T.G. NELSON, and KLEINFELD, join, dissenting:

For the first time in this circuit or any other, the en banc court has held that a raw number of prosecutions, without reference to a comparison group and without evidence that others, similarly situated except for their race, have not been prosecuted, provides a colorable basis for the existence of both discriminatory effect and discriminatory intent sufficient to order discovery from the government in connection with a criminal defendant's selective prosecution defense. Also, though both the Supreme Court and this circuit have made clear that discriminatory effect and discriminatory intent are two different elements, each of which must exist, the majority's opinion effectively collapses intent into effect by holding that both may be shown by the same, insubstantial statistic. Additionally the opinion has formally removed the "high threshold" that, until now, we explicitly (and other circuits implicitly) have required to be met before discovery relating to a selective prosecution claim can be ordered. In so doing, the majority opinion radically, and unnecessarily, rewrites the law of selective prosecution. I therefore dissent.

I

The government's appeal requires us to decide whether five defendants indicted in 1992 for conspiring to distribute cocaine base (in part through using an armed guard) in violation of 21 U.S.C. §§ 846 and 841(a)(1), four of whom are also charged with using a firearm in connection with the drug offenses under 18 U.S.C. § 924(c), are entitled to discovery on their claimed defense of selective prosecution on

account of race.[1] I would hold that they are not because Armstrong has failed to show a colorable basis for the existence of either of the elements required for selective prosecution, discriminatory effect and discriminatory intent.

Armstrong seeks to show that this prosecution was undertaken not because of the crimes committed, but rather because the United States Attorney's Office prosecuted these defendants as part of a systematic policy intentionally to discriminate against blacks in its prosecutorial decisions. The discovery request was based on evidence that of the 24 defendants represented by the Federal Public Defender's Office (FPD) in § 846 and § 841(a)(1) cocaine base cases closed by the FPD in 1991, all were black. The filing stamp numbers on the closed cases in this study range from "88" to "91," indicating that the defendants whose cases were closed by the FPD in 1991 were prosecuted over a four-year period.

After the district court ordered discovery, the government moved for reconsideration and presented evidence that at least four non-black defendants were prosecuted on crack charges during the period when the cases in the FPD's study were opened, two of whom were represented by the FPD, and at least seven were charged in 1992, the year the *Armstrong* defendants were indicted. In addition, the government submitted declarations indicating that in total, without breakdown by type of drug, approximately 2400 persons were charged with violations of § 841, and 1700 with violations of § 846, in the past three years; that race played no part in the investigation which resulted in the *Armstrong* defendants' arrests;

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[1] I refer to all of the defendants collectively as "Armstrong."

that the county district attorney's offices prosecute many black cocaine base offenders; that socio-economic factors account for the prevalence of drugs and trafficking patterns in different communities; and that all charging decisions made by the United States Attorney's Office, including in this case, are made on the basis of whether a federal offense meeting the Office's guidelines has occurred, the overall strength of the evidence, the deterrence value and federal interest associated with the particular case, the criminal history of the suspects, and other race-neutral criteria. Specifically as to this case, the declaration of the then-Chief of the Criminal Complaints Section explained why the Armstrong defendants were prosecuted and stated that the decision to charge them was consistent with the guidelines: there were over 100 grams of cocaine base involved—more than twice the quantity necessary to trigger a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a substantial crack cocaine ring; the case was jointly investigated with a federal Bureau of Alcohol, Tobacco and Firearms agent; there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence was extremely strong, including audio and videotapes of the defendants; threats had been made to arresting officers by Armstrong; and several of the defendants had criminal histories including narcotics and firearms violations.

Armstrong countered with a declaration by defense counsel stating that she had spoken with a halfway house intake coordinator who told her that in his experience in treating cocaine base addiction, the number of caucasian and minority users and dealers is the same. Armstrong also offered a declaration by

another defense attorney averring that of the defendants facing crack charges whom he has represented in federal court, all were black, and that he has never heard of non-blacks being prosecuted in federal court, whereas based on what he has heard, he believes that the state prosecutes many non-black cocaine base offenders in state court. Finally, Armstrong proffered an article from the *Los Angeles Times*, which indicates that blacks disproportionately commit cocaine base offenses.

The district court found that Armstrong had made a sufficient showing to require the government to provide to the defense:

> (1) A list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses;
>
> (2) The race of the defendant(s) in each of those cases;
>
> (3) Whether each case was investigated by federal, state or joint law enforcement authorities; and
>
> (4) An explanation of the criteria used by the United States Attorney's Office for deciding whether to bring cocaine base cases federally.

The court's initial ruling concluded:

> In this case we have a fairly general charge—one that we see regularly in this courthouse—and whether it's coincidental or not, that out of the group that the public defender—that Ms. O'Connor provides us information on—all of them happen to be of the same racial group.
>
> I think the number is adequate that would at least require the Government to provide some explanation. The time period is such that would

require some explanation. The charges are the same or similar, and the race is the same in each case.

In denying the motion to reconsider, the court further concluded:

> The statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the Government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court.
>
> Without the criteria, the statistical data is evidence and does suggest that the decision to prosecute in Federal court could be motivated by race.
>
> Without expert testimony, this Court cannot conclude that the Defendants' evidence is explained by social phenomena.
>
> The executive branch has a responsibility to dissuade public opinion that its decisions to prosecute or where to prosecute are not motivated by improper reasons such as race, and the evidence of who was prosecuted and why those persons were prosecuted and where those persons were prosecuted is within the peculiar knowledge of the Government and therefore, as the Court indicated at the previous hearing, it would be this Court's position that it is the Government that would have to provide that evidence so that Defendants could analyze it and decide if there is any basis for filing a motion to dismiss.

The government declined to comply with the order, and the court granted Armstrong's motion to dismiss. This appeal followed.

The panel, relying on *United States v. Bourgeois*, 964 F.2d 935 (9th Cir.), cert. denied, — U.S. ——, 113 S. Ct. 290, 121 L.Ed.2d 215 (1992), reversed on the ground that a defendant must supply a colorable basis for believing that others similar to him—except that they are not in his protected class—were not prosecuted, and that other evidence adduced by Armstrong was too flimsy to be accorded any weight. *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1994).[2]

We went en banc in part to resolve the tension between *Bourgeois* ("colorable basis" founded on specific facts required for discovery of whether prosecution is discriminatory) and *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir.1992) ("prima facie showing" required to make prosecution answer for a particular charging or plea bargaining decision satisfied by district court's sua sponte suspicion of unconstitutional conduct or a defendant's evidence demonstrating reasonable inference of invidious discrimination), which the panel construed as being limited to discovery orders based on the judge's own experience. Without commenting one way or the other on a court's sua sponte powers to initiate a selective prosecution inquiry because that issue is not before us,[3] I agree with the majority that discovery should be governed by a single standard.

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[2] Hon. Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation, wrote for the court. I joined that opinion, and Judge Reinhardt dissented.

[3] The district judge in this case ruled on the basis of the defendants' motion for discovery.

Although the majority opinion indicates that it does not consider the question of whether or under what circumstances a judge may rely on facts within her own experience, [pp. 7a-

However, I disagree with the majority's opinion. Although it appears to embrace the "colorable basis" standard we adopted in *Bourgeois*, the opinion actually guts it by holding that when a selective prosecution claim is based on race, evidence "tending to show that only members of racial or ethnic minority groups have been prosecuted" will suffice. [P. 19a, *supra*], n. 6. Instead, I would reaffirm the *Bourgeois* standard, and hold that the district court erred as a matter of law in finding that Armstrong made an adequate showing in the absence of any evidence that others, similarly situated except for being non-black, were not prosecuted. By the same token, the court should not have ordered discovery based on its conclusion that "the statistical data provided by the Defendant raises a question about the motivation of the Government"; the proper legal standard is not whether the defendant's evidence "*raises a question*," but whether it provides a *colorable basis* for the *existence* of discriminatory effect and discriminatory intent. In the absence of any evidence that the government purposefully selected these defendants for prosecution on account of their race, there is no colorable basis for the existence of discriminatory intent as a matter of law. The district court also went astray in founding its order on a "fairly general charge" instead of on specific facts as to these defendants. Further, at the

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8a, *supra*], it cites *Redondo-Lemos*, 955 F.2d at 1298, 1302, with approval on the point that district judges are well situated to discern "patterns of discrimination." [Pp. 7A-8a, *supra*]. To the extent this simply means that when exercising discretion within the law, reviewing courts should be deferential to the district judge, I could not agree more. However, to the extent that the opinion means to endorse discovery based on something outside the record, it is dicta and I disagree.

discovery stage, it is the defendant's burden to provide facts that, if fleshed out by the discovery sought, would tend to prove both elements of selective prosecution. Thus, the district court's order fails in two additional respects: first, it shifts to the government the "responsibility to dissuade public opinion," but ignores the government's submissions; and second, the discovery ordered does not advance the ball game because racial identity and criteria for federally charging crack and firearms violations will still only show who was prosecuted, not who wasn't. In any event, the FPD's study relates to crack cases closed by that office and says nothing about any pool of *crack and firearms* offenders. As the discovery that was ordered targets prosecutions for both crack and firearms violations, it lacks any basis at all. I would, therefore, reverse.

II

Armstrong contends that the en banc court should adopt the "reasonable inference" test articulated in *Redondo-Lemos* instead of the "colorable basis" standard set out in *Bourgeois*. Short of this, he suggests that *Bourgeois* and *Redondo-Lemos* could be reconciled by defining "colorable basis" as the Seventh Circuit did in *United States v. Heidecke*, 900 F.2d 1155 (7th Cir.1990), to mean that a defendant need only produce "some evidence to show the essential elements of the claim." *Id.* at 1159.

I do not believe that it is necessary to do more than resolve the conflict between *Bourgeois* and *Redondo-Lemos*, because the evidence in this case does not pass muster under either the *Bourgeois* or *Heidecke* standard. See *United States v. Kerley*, 787 F.2d 1147, 1150 (7th Cir. 1986) (applying *Heidecke* test suggested by Armstrong but reversing discovery order

because the defendant presented no evidence that he was singled out for prosecution while others were not prosecuted, though they similarly were in violation of the law). Nevertheless, the majority opinion uses this en banc opportunity to look afresh at what the standard for discovery on a selective prosecution defense should be.

There is no question that selective prosecution claims of the sort we address today are deeply troubling. Such claims bring powerful interests into conflict: the nation's commitment to rid itself of drugs, on the one hand, and the individual's right not to be singled out for prosecution on account of race, on the other. They reflect concerns which are legitimate and widespread—and which I share—that mandatory minimum sentences in general, and those for crack offenses in particular, fall heavily on young black males.[4] Such things are, however, up to the Congress and the United States Sentencing Commission. Our task is far more discrete, having to do only with the specific showing made by the defendants in this particular case, and being constrained by the difference between our role as judges and the role of the government as prosecutor, which the Supreme Court has admonished us to remember in the context of selective prosecution claims:

> In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. "[S]o long as the prosecutor has probable

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[4] Data from the United States Sentencing Commission, for example, indicate that 87.9 percent of all those convicted for cocaine base offenses nationwide are African-American. *United States Sentencing Commission Annual Report 1993*, table 62.

> cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

United States v. Wayte, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985) (citations omitted).

In that light, I disagree with the majority that there is any call to revisit *Bourgeois*. There we held that

> to obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors. This is a high

> threshold. As has been true historically, it will be the rare defendant who presents a sufficiently strong case of selective prosecution to merit discovery of government documents.

964 F.2d at 939. *Bourgeois* is in the mainstream of the law,[5] and appropriately balances the interests of

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[5] The First Circuit test for an evidentiary hearing is sufficient facts tending to show that the defendant has been selectively prosecuted and raising a reasonable doubt about the propriety of the prosecutor's purpose. *United States v. Penagaricano-Soler*, 911 F.2d 833, 838 (1st Cir.1990). The Third Circuit's test is "colorable entitlement to the defense of discriminatory prosecution. . . ." *United States v. Berrigan*, 482 F.2d 171, 181 (3rd Cir.1973). The Fifth Circuit's is "colorable claim of selective prosecution," *United States v. Kahl*, 583 F.2d 1351, 1355 (5th Cir.1978). The Sixth Circuit allows discovery where there is "some evidence tending to show the existence of the essential elements of the defense." *United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir.1989). The Seventh Circuit's standard is a "colorable basis for the claim," which it defines as "some evidence tending to show the essential elements." *United States v. Heidecke*, 900 F.2d 1155, 1158-59 (7th Cir.1990). The D.C. Circuit requires a "colorable showing" of both elements. *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 933 (D.C.Cir.1982), *cert. denied*, 459 U.S. 1172, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983).

The Fourth Circuit requires a nonfrivolous showing of both elements to merit discovery. At least a legitimate issue of improper governmental conduct must be raised, and in determining whether one has been, the district court may consider the government's explanation for its conduct. *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir.1986) (relying on *Wayte* dissent). The Eleventh Circuit's standard is "colorable entitlement" which will be met by evidence that is "past the frivolous state and raise[s] a reasonable doubt as to the prosecutor's purpose." *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir.1987), *vacated on other grounds*, 836 F.2d 1312 (1988) (quoting *United States v. Hazel*, 696 F.2d 473, 475 (6th Cir.1983)).

The Second and Eighth Circuits require that a defendant make a prima facie showing before discovery can be ordered. *St. German of Alaska Eastern Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1095 (2d Cir.1988); *United States v. Parham*, 16 F.3d 844, 846 (8th Cir.1994) (stating that the defendant's burden is a "heavy one").

prosecutorial discretion and freedom from invidious discrimination. It correctly acknowledges that the threshold for discovery is high because the showing required on the merits of a selective prosecution defense is high.

A "high threshold" is appropriate because courts are ill equipped to assess a prosecutor's charging decisions, and oversight of prosecutorial decisions could undermine effective law enforcement. *Bourgeois*, 964 F.2d at 939-40; *Wayte*, 470 U.S. at 607-08, 105 S.Ct. at 1530-31. As we explained in *Bourgeois*:

> We believe that this high threshold will discourage fishing expeditions, protect legitimate prosecutorial discretion, safeguard government investigative records, and yet still allow meritorious claims to proceed. This threshold also draws on the effectively high hurdle all the circuits have adopted, regardless of the phraseology of their standards. Our research of circuit court opinions uncovered only a handful of instances in the past few decades in which a defendant obtained discovery or dismissal of charges based on a selective prosecution claim. In those cases, the defendants presented solid, credible evidence in support of their claims.

964 F.2d at 940.

The majority opinion nevertheless declares that the meaning of the *Bourgeois* standard is "elusive," and uses that excuse to rewrite the law. However, "colorable basis" as a standard is no more elusive than any other threshold standard. It is the standard most other circuits apply. Although there may be no way precisely to define it, I doubt that many judges would disagree that "colorable basis" is a lower level of specificity than a prima facie showing, but greater than an allegation. As *Bourgeois* indicates, it simply requires some specific facts—not allegations, speculation, conclusions, or questions—that are solid and credible enough to indicate that both elements of a selective prosecution defense exist.

While the majority opinion purports to clarify what "colorable basis" means, it actually crafts a new standard which is far more elusive than *Bourgeois*. It is variously described as "some evidence *tending* to show the essential elements of the claim," [p. 8a, *supra*], "more than frivolous and based on more than conclusory allegations," *id.*, more than "frivolous and unwarranted allegations," [p. 14a, *supra*], "some evidence that tends to show that the United States Attorney may be engaging in discrimination," [p. 21a, *supra*], and "evidence that reasonably permits one to find a colorable basis for concluding that race-based prosecutorial selection may have occurred." [P. 26a, *supra*]. To permit discovery on a showing that discrimination "may" have occurred in the absence of any facts tending to show that the defendant has been singled out for prosecution on account of race puts us out of line with all other circuits.[6] To the extent that the new threshold is "more than frivolous and unwarranted allegations," it may well be "more akin"

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[6] *See* n. 16, *infra* at [61a-62a].

to that favored by two circuits and the dissent in *Wayte*, but is out of step with the others.[7] *Bourgeois* is in line with the majority view, is faithful to the Supreme Court's admonitions in *Wayte*, and appropriately balances the interests at stake. We should, therefore, stick with it.[8]

III

We previously held in *Bourgeois*, 964 F.2d at 937, and the majority continues to hold, that a district court's decision to order or not order discovery is reviewed for abuse of discretion. While we should not substitute our judgment for that of the district court, we do reverse even under this deferential standard

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[7] *See* n. 5, *supra* at [42a-43a].

[8] The majority opinion also appears to make the showing required—whatever its threshold—contingent on whether the facts that would establish a colorable basis are "easily obtainable" by defendants. [P. 12a, *supra*]. It does so by relying on the dissent in *Wayte*, 470 U.S. at 624, 105 S.Ct. at 1539. However, all that Justice Marshall said on this point was that a standard which requires a defendant to present "some evidence tending to show the existence of the essential elements of the defense" "recognizes that most of the relevant proof in selective prosecution cases will normally be in the Government's hands." *Id.* In no way did he suggest a moving target depending on "what evidence is readily available," as the majority opinion holds. [P. 12a, *supra*]. In any event, we have previously held that the fact that information might be helpful does not get defendants over the discovery hurdle. *See e.g., United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126, 102 S.Ct. 976, 71 L.Ed.2d 113 (1981). The showing required should be a colorable basis that discriminatory effect and intent exist; it should not vacillate depending upon whether counsel has access to more or less information, or how readily available the evidence is. *See, e.g., United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir.1972) (Steele himself located six other similarly situated persons who had not been prosecuted).

when the court either does not apply the correct law, or rests its decision on a clearly erroneous finding of material fact. *Marchand v. Mercy Medical Center*, 22 F.3d 933, 936 (9th Cir.1994).

IV

I would hold that the district court erred as a matter of law in concluding that Armstrong made a sufficient showing in the absence of any evidence that similarly situated non-black offenders were not prosecuted, and in the absence of any finding that the statistical pattern presented could be so stark, if fleshed out by discovery, as to be inexplicable on grounds other than intentional discrimination on the basis of race. The Supreme Court has made clear that unless there is an overtly discriminatory classification, which Armstrong does not claim in this case, a defendant is required to show both discriminatory effect and discriminatory intent in order to make out a defense of selection prosecution. *Wayte*, 470 U.S. at 608, 105 S.Ct. at 1531. Without any evidence of similarly situated offenders who share everything in common with the defendant except for the constitutionally impermissible factor, there can be no colorable basis for the existence of discriminatory selection or effect. Nor is there a colorable basis for the existence of discriminatory intent because intent to discriminate against black defendants cannot possibly be inferred from only a statistic that has no comparison pool, is statistically insufficient to suggest a pattern inexplicable save for race, and is in fact explained on grounds having nothing to do with race: that these defendants dealt in substantial quantities of crack, many times, using firearms; made threats; had prior drug and firearms convictions; and were caught in the act on tape.

While acknowledging that both discriminatory effect and discriminatory intent must be shown, the majority opinion effectively collapses the two by holding that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim." [Pp. 10a-11a, *supra*]. In this it is incorrect: from the statistic in evidence, "statistical disparity" cannot be inferred. Even if it could be, the statistical disparity which could be inferred from 24 closed prosecutions against black defendants in one year and 11 opened cases involving non-black defendants over a four year period has no possibility of being "stark" enough to show discriminatory purpose when the government has offered legitimate, race-neutral reasons for prosecuting crack cases in general and the *Armstrong* defendants in particular.

A

We have held a number of times in a number of different cases that the first thing a defendant must show is that "others similarly situated have not been prosecuted. . . ." *United States v. Wayte*, 710 F.2d 1385, 1387 (9th Cir.1983), *aff'd*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985), quoted in *Bourgeois*, 964 F.2d at 938. *Bourgeois* failed to establish a colorable basis for the first element of his claim because he made "no attempt to show that, in any span of time, the government has declined to prosecute similarly situated, non-black felons illegally in possession of firearms." *Id.* at 941. The majority opinion mistakenly distinguishes *Bourgeois* by emphasizing that it involved only one operation, over a single two-day period; in fact, *Bourgeois'* focus was on both the span

of time and scope necessary to have probative value and the lack of similarly situated prosecutions. In *United States v. Wilson*, 639 F.2d 500 (9th Cir.1981), the defendants claimed that they were singled out by the government because they were tax protesters. The evidence showed that out of 425 taxpayers who filed an "exempt" W-4 form the only two who were prosecuted were tax protesters; that an IRS investigator was unaware of any tax protestors who were not prosecuted for non-payment of taxes; and that others whose W-4 forms might bear investigation had not been prosecuted. We held that the evidence did not suffice for a selective prosecution claim as the defendants

> have not shown, as the Oaks[9] test requires, that other[s] similarly situated who have not exercised their rights have not been prosecuted. The statistics listed above show that there were other prosecutions and the Wilsons have not shown that those defendants were also tax protestors. This being so, we cannot find that the Wilsons carried their burden of proving that the decision to prosecute was made because they exercised their constitutional rights.

Id. at 504. In *United States v. Aguilar*, 883 F.2d 662 (9th Cir.1989), *cert. denied*, 498 U.S. 1046, 111 S.Ct.

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[9] The reference is to *United States v. Oaks*, 527 F.2d 937 (9th Cir.1975), *cert. denied*, 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1191 (1976). *Oaks* held that "[t]o sustain a claim of selective or discriminatory prosecution, a defendant bears the burden of proving first that 'others similarly situated generally have not been prosecuted' for similar conduct, and second that 'his selection was based on an impermissible ground such as race, religion or his exercise of his first amendment right to free speech.' " *Id.* at 940, quoting *United States v. Scott*, 521 F.2d 1188 (9th Cir.1975).

751, 112 L.Ed.2d 771 (1991), we upheld the district court's denial of defendants' request for discovery and an evidentiary hearing on their motion for dismissal based upon selective prosecution because the defendants' suggested definition of those similarly situated excluded the most relevant analogous class. Stating that "[a]bsent a similarly situated control group, the government's prosecution of a defendant exercising his constitutional rights proves nothing," *id.* at 706, we joined the D.C. Circuit in the understanding that " '[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances.' " *Id.*, quoting *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 946 (D.C.Cir.1982), *cert. denied*, 459 U.S. 1172, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983). Accordingly, we held that "if similarly situated persons are being prosecuted then appellants fail to make the required showing." *Id.* Likewise in *United States v. Gutierrez*, 990 F.2d 472 (9th Cir.1993),[10] we affirmed the district court's failure to

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[10] Although the majority purports to overrule *Gutierrez* to the extent that it is inconsistent with the opinion's view that "statistical disparities alone may suffice to provide the evidence of discriminatory effect and intent that will establish a prima facie case of selective prosecution," [p. 10a, *supra*], n. 1, I believe *Gutierrez* remains good law in part because I wrote it, and in part because I question the license of an en banc court considering a *discovery* issue to overrule the standard for prevailing on the *merits*. Discovery cannot be unhinged from the merits; retroactively to change the *merits* standard to facilitate *discovery* is to put the cart before the horse. It is all the more remarkable to do so with respect to a decision that was not taken en banc, and that is consistent with all prior authority in this circuit, as well as others, *see, e.g., Irish People*, 684 F.2d 928; *United States v. Huff*, 959 F.2d 731, 735 (8th Cir.) (statistics showing 87% of people arrested are

grant a motion to dismiss for selective prosecution on charges of distributing cocaine base within 1000 feet of a school because "[s]tatistics showing a high percentage of certain groups being prosecuted, alone, are insufficient to establish that similarly situated persons are not being prosecuted." *Id.* at 476. And in Ness, we considered a showing quite similar to Armstrong's and held with respect to Ness's showing:

> While he showed that similarly situated members of his tax protest group had also been prosecuted, Ness did not show a single instance of a similarly situated but nonprotesting violator who had not been prosecuted. The fact that access to the Government's files might be helpful to a defendant seeking to prove discriminatory prosecution does not relieve him of the burden of making an initial showing, nor does that fact, in itself, entitle every defendant raising such a claim to discovery.

652 F.2d at 892.

Thus it is well settled: to succeed on a claim of selective prosecution, a defendant has the burden of *establishing* that others similarly situated have not been prosecuted. The burden for purposes of discovery is substantively the same, only it is met by showing a *colorable basis* that others similarly situated have not been prosecuted.[11] As the panel explained:

African-Americans insufficient to establish prima facie case), *cert. denied*, — U.S. ——, 113 S.Ct. 162, 121 L.Ed.2d 110 (1992).

[11] This view is in accord with all other circuits to have considered the question. *See, e.g., Irish People*, 684 F.2d at 946 (reversing discovery order; no evidence others weren't

> Requiring defendants to provide a colorable basis for believing that others similarly situated have not been prosecuted is a reasonable requirement. "Selective prosecution" implies that a selection has taken place. If a defendant is part of a protected class, that alone does not provide a colorable basis for believing that a selection has taken place; nor does evidence demonstrating that other members of the protected class were prosecuted provide a colorable basis for so believing. Rather, a defendant must supply a colorable basis for believing that others similar to him except that they are not in his protected class were not prosecuted. Without a colorable basis to believe that others similarly situated were not prosecuted, the most reasonable conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental.

Armstrong, 21 F.3d at 1436-37.[12]

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prosecuted); *Kahl*, 583 F.2d at 1353 (discovery denied; no showing that the government didn't prosecute others similarly situated); *Parham*, 16 F.3d at 847 (no threshold showing because of absence of evidence that other's acts of ballot fraud were tolerated without prosecution); *United States v. Larson*, 612 F.2d 1301, 1305 (8th Cir.) (no prima facie case; no showing that others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted), *cert. denied*, 446 U.S. 936, 100 S.Ct. 2154, 64 L.Ed.2d 789 (1980); *cf. Hazel*, 696 F.2d at 475 (arguably asserting that 34 other members of tax revolt group had not been prosecuted suffices for first prong); *Greenwood*, 796 F.2d at 52 (discovery denied; contention that five similarly situated white agents were not prosecuted groundless).

[12] In *Irish People*, the D.C. Circuit similarly concluded that "it makes sense to require a colorable claim of both [parts of the

Armstrong's showing lacks any specific evidence that the government has failed to prosecute similarly situated non-blacks, or that any similarly situated non-black cocaine base offender was not chosen for federal prosecution but was left to be prosecuted in state court. Evidence that all 24 crack cases closed by the Federal Public Defender in 1991 involved black defendants is a meaningless number without some pool against which to measure it. It shows only that blacks have been prosecuted, not that others similarly situated who are not black have not been prosecuted. The study says nothing about cases that were *opened* by the FPD during the period its closed

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two-element test for selective prosecution] before subjecting the Government to discovery,"[12] explaining:

> Defendant must make a colorable showing that he has been especially singled out, that there exist persons similarly situated who have not been prosecuted. Without such a showing, it is irrelevant that the British or Irish may also have wanted the suit brought.
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> . . . It is clear . . . that a demonstration of selection is indispensable for the defense and that the burden of so demonstrating lies squarely on the defendant.
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> . . . .
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> . . . Where defendant cannot show anyone in a similar situation who was not prosecuted, it has been held that he has not "met even the threshold point of the *Yick Wo* doctrine—'official discrimination . . . between persons in similar circumstances, material to their rights. . . .' "

684 F.2d at 946-47. *See also Kerley*, 787 F.2d at 1150 (to discover government documents defendant must introduce some evidence tending to show the existence of the essential elements of the defense, including that he was singled out for prosecution while others similarly situated haven't been).

cases were active.[13] (Although that would come closer to a valid sample, there is no basis in the record for extrapolating from the Federal Public Defender's study a figure representative of all relevant defendants prosecuted in the Central District.) Nor does the statistic speak to whether the Federal Public Defender had other cases involving non-black defendants that were opened during the same period that cases closed in 1991 were opened (1988-1991). Indeed, the government's evidence that during this period at least two non-black defendants were prosecuted who were represented by the FPD, and two others were prosecuted who were not represented by the FPD, is uncontradicted. It is no answer to suggest, as Armstrong and the majority do, that the government's evidence is irrelevant because it is outside the defendant's study: the *court* must identify an appropriate comparison group, *Aguilar*, 883 F.2d at 706, and by definition, the appropriate population. In any event, the FPD study is only relevant to the extent that it accurately represents the universe of prosecutions.[14] There can

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[13] The majority opinion's statement that "the factor used to choose the cases examined in the study—whether the case had been closed—was a factor independent of and not correlated with race," [p. 20a, *supra*], n. 7, is without any support in the record. It could as well be said—equally without any support in the record—that the reason closed cases instead of opened cases was chosen was because (as the government's evidence shows) non-blacks were prosecuted in cases that were opened during 1988-1991 but were closed in some year other than 1991.

[14] The majority opinion "fail[s] to see the difference" between cases closed and cases opened. [p. 20a, *supra*, n. 7. They are, of course, opposite sides of the same coin. Whether looked at through the lens of "opened" or "closed," the number of black defendants prosecuted on crack charges, standing alone as it does here without reference to whether non-black

be no serious question that evidence of prosecutions which were actually brought is more on target than a study of a small sample of closed cases that is not random and is biased by the composition (indigent defendants only) of the FPD's clients. Among other things, the government's evidence shows that charges were filed against seven non-black defendants in 1992—the same year that the *Armstrong* defendants were indicted. That is the only evidence in the record about what went on in the specific year of the prosecution in this case. Without putting too fine a point on it, that fact cannot be discounted as immaterial.

In addition, there is no indication that any of the defendants in the 24 cases encompassed by the FPD

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crack dealers who sold large quantities and used firearms and had priors and were caught in the act on tape were not prosecuted, has no tendency to prove the elements of selective prosecution. However, on the theory adopted by the majority opinion—that the number prosecuted is alone sufficient—it does make a difference whether the focus is on cases opened or cases closed. The opinion fixes only on the closed aspect of the closed cases in the FPD study, whereas the government's evidence focuses, correctly, on the opened aspect of the closed cases as well as others which were prosecuted against non-black defendants who were either not represented by the FPD at all or at least not in cases that were closed in 1991. Cases closed can't have any tendency to prove discrimination except to the extent that they show what cases were brought, or opened, and thus what was motivating the United States Attorney's Office when it decided to file charges against Armstrong. The cases closed in 1991 were indicted in 1988, 1989, 1990, and 1991. The evidence shows that non-black defendants were also indicted during that period. Thus, contrary to the majority opinion, the govern-ment's showing directly rebuts both the "accuracy" of the study (to the extent that accuracy is in issue, which it really isn't) and its probative value on the elements of selective prosecution (which is in issue).

study were similarly situated to the defendants in this case. All of the *Armstrong* defendants are charged with conspiring to distribute cocaine base using an armed guard, and four of the five are charged with a firearms violation. The population in the FPD study is crack offenders—not crack offenders who committed cocaine base offenses while possessing firearms. As the discovery ordered is of prosecutions for both crack and firearms offenses, there is no basis in the statistical evidence for finding that the discovery ordered is relevant. In addition, the study concerns only those defendants who were prosecuted in 1991 or before. Thus, the study population does not include Armstrong and cannot mean anything so far as *these* defendants are concerned. An inference of discrimination against these defendants can therefore not arise even if the statistic could imply discrimination against crack defendants whose cases were closed by the FPD in 1991.

For these reasons, the only statistic in evidence affords no basis for inferring the existence of discriminatory selection, or effect. The mere fact that all the offenders share the same trait (*i.e.*, are black) cannot prove that this trait was the motivation for selecting them for prosecution unless other similar offenders who do not possess that trait were not selected. The FPD study shows nothing more than the fact that all persons it represented in cases closed in 1991 shared the common trait of being black; it sheds no light on whether the government discriminated as there is no showing that those without the trait were, or would be, treated differently.

Armstrong also relies on the *Los Angeles Times* article and two declarations presented in connection with the government's motion for reconsideration.

One is counsel's declaration that an Impact House employee told her that in his experience dealing with crack addiction, there are an equal number of caucasian and black users and dealers; the other is another counsel's declaration that he had never heard of non-blacks being prosecuted in federal court whereas they were in state court. It is unclear that the district court relied on anything other than the FPD study, as it made no reference to the declarations and said it found nothing of value in the newspaper article. Regardless, assuming that it was proper for the court to consider the declarations in connection with a discovery request even though both were hearsay, neither declaration sets out any specific fact or credible evidence of the existence of discriminatory effect or intent. Counsel's declaration about not having heard of non-blacks being prosecuted in federal court is entitled to no weight in light of the government's evidence that non-blacks were in fact prosecuted; his further statement that "many" crack cocaine sales cases prosecuted in state court involve racial groups other than blacks lacks any relevant force because it can't be determined whether they are similarly situated in any respect to the *Armstrong* defendants. By the same token, Impact House is a residential drug treatment center; it houses addicts, not dealers unless they are also addicts, and nothing in the declaration suggests that the intake coordinator's experience is with offenders who are similarly situated to the *Armstrong* defendants.

In sum, there is no indication that the government has not prosecuted similarly situated non-black offenders. However, even if an inference of disproportionate impact for purposes of selective prosecution could be drawn, Armstrong's evidence does

not establish a colorable basis that he was prosecuted because of his race.

B

" 'Discriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte*, 470 U.S. at 610, 105 S.Ct. at 1532 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)). Nothing in the record indicates that the government impermissibly targeted blacks for prosecution or acted improperly in bringing the *Armstrong* indictment; to the contrary, there is evidence that the government made its charging decision in *Armstrong* based on the quantity of drugs involved, the number of sales and defendants, involvement of a federal agency concerned with firearms in the investigation, multiple firearms violations intertwined with the narcotics trafficking, strength of the evidence (including tapes), the making of threats, and criminal histories having to do with both drugs and firearms. These are the very factors identified by the Supreme Court in *Wayte* that courts must hesitate to examine because they are intrinsic to prosecutorial discretion. 470 U.S. at 607, 105 S.Ct. at 1530.

Armstrong argues, however, that a prima facie case of purposeful discrimination may be made by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. He submits that intent may be found even though there is no evidence that the government is hostile to the group, and the government gives a race-neutral explanation for its

action, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); that intent may be proved circumstantially, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 563-64, 50 L.Ed.2d 450 (1977); and that circumstantial evidence of discriminatory intent may include proof of disparate impact, *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048-49, 48 L.Ed.2d 597 (1976). I agree, in the abstract. In limited circumstances "a clear pattern, unexplainable on grounds other than race" may be "stark" enough to infer intent, but such cases are "rare." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 563-64, *McCleskey v. Kemp*, 481 U.S. 279, 293 n. 12, 107 S.Ct. 1756, 1767 n. 12, 95 L.Ed.2d 262 (1987).[15] Here, the record consists of the FPD study, which shows that in 24 cases prosecuted from 1988-1991 and closed by the Federal Public Defender in 1991 the defendant was black; the government's proffer that 11 non-black defendants were prosecuted during the period these cases were opened and Armstrong was indicted; and evidence that the *Armstrong* defendants were charged because of the severity of their criminal activity. In no way is this a "stark" statistical pattern, unexplainable or unexplained on grounds other than race. The statistic alone cannot, therefore, support any inference of intent.

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[15] Jury-selection cases, *see, e.g., Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), are somewhat of an exception because of the nature of the task, *McCleskey*, 481 U.S. at 293 n. 13, 107 S.Ct. at 1768 n. 13, but they are inapposite for the additional reason that the statistics in those cases show a disparity between the population and those summoned for duty. As there is no comparison group here, no disparity can be shown.

This is clear from comparing the two cases where the Supreme Court has seen impact alone as determinative, *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In each, the pattern was "stark," *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 563-64, and in each, the complaining parties demonstrated the existence of similarly situated persons who were treated differently. In *Gomillion*, when the state legislature redrew the boundaries of the City of Tuskegee from a square into a 28-sided figure, the effect was "to remove from the city all save for only four or five of its 400 Negro voters while not removing a single white voter or resident." *Gomillion*, 364 U.S. at 341, 81 S.Ct. at 127. In *Yick Wo*, San Francisco had enacted an ordinance banning the use of wood buildings for laundries in the absence of consent by the Board of Supervisors. There were about 320 laundries in the city of which 310 were wood, 240 were owned by Chinese, and 80 were owned by non-Chinese. One hundred fifty Chinese operators were arrested for operating a laundry in violation of the ordinance, while no non-Chinese operators were arrested. Two hundred Chinese owners petitioned for consent from the Board, and all their petitions were denied; of the non-Chinese owners, all but one was granted. Thus, unlike this case, in *Gomillion* and *Yick Wo* there was an identifiable pool against which comparisons could be made, and that comparison showed such dramatic disparities in how the groups were treated that the "conclusion was irresistible, tantamount for all practical purposes to a mathematical demonstration," *Gomillion*, 364 U.S. at 341, 81 S.Ct. at 127, that the state acted with discriminatory intent.

Given the absence of any evidence about any comparison group in this case, and thus of any possible statistical disparity in how different classes are treated, there is no way under existing law that the evidence in this case establishes a colorable basis for the existence of discriminatory intent.

C

The majority opinion's logic flows from its assumption that "statistical disparities alone may suffice to provide the evidence of discriminatory effect and intent that will establish a prima facie case of selective prosecution." [P. 10a, *supra*]. For this it relies on *Redondo-Lemos*, 955 F.2d at 1301-02. However, what Judge Kozinski actually wrote is that, in connection with the *discriminatory effect* prong, "[a]t a threshold level, whether or not there is a significant disparity in the treatment of classes of defendants can normally be determined on the basis of statistical evidence." *Id.* at 1301. *Redondo-Lemos* does not say that any statistic is a statistical disparity, or that a statistical *disparity*, if it does exist, proves intent no matter what its significance. Nevertheless, the majority's opinion makes a statistic—which is all there is in this case—into a "statistical disparity"; then makes a "statistical disparity"—no matter how significant—into a prima facie showing; then asserts that the standard for discovery is lower than a prima facie showing; then holds that "inadequately explained evidence of a significant statistical disparity" suffices to show a colorable basis of discriminatory intent and effect. [Pp. 10a, 11a, *supra*]. This syllogism simply is not the law. Statistics have to be measured against something, otherwise there can be no "disparity"

because there is nothing from which to deduce a difference.

Of the need to show that others similarly situated have not been prosecuted, the opinion first says the obvious: "a defendant is not required to *demonstrate* that the government has failed to prosecute others who are similarly situated. He need only provide a *colorable basis* for believing that other similarly situated persons have not been prosecuted." *Id.* at 1516. Then the opinion comes full circle by concluding that the FPD study "clearly satisfies this requirement" because "[a]t a threshold level, whether or not there is a significant disparity in the treatment of classes of defendants can normally be determined on the basis of statistical evidence, without reference to the underlying facts of individual cases." *Id.* This doesn't follow as a matter of fact, or as a matter of law.[16]

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[16] There has been evidence of disparity (not just a study of numbers prosecuted) in each of the few cases in which a finding of selective prosecution or an order for discovery has been upheld on appeal. *See, e.g., Steele*, 461 F.2d at 1151 (conviction reversed; defendant located and presented evidence of six other persons who, like him, had refused on principle to complete census forms but who, unlike him, had not taken a public stand against the census and had not been prosecuted); *Adams*, 870 F.2d at 1146 (discovery ordered; record suggests that taxpayers who underreport income and voluntarily amend returns and pay deficiency, as defendants did, have not been prosecuted, though defendants were); *Gordon*, 817 F.2d at 1540 (colorable entitlement shown and discovery and evidentiary hearing affirmed; magistrate judge found that defendants presented some evidence of similar violations by other persons who have not been prosecuted); *cf. United States v. Berrios*, 501 F.2d 1207, 1211-12 (2d Cir.1974) (declining to reverse order for hearing and production of government memorandum in camera based on counsel's affidavit that hundreds of other union officials had prison

Perhaps recognizing this, the majority opinion reveals in a footnote what its real holding is: "no 'comparison pool' is necessary when the record contains statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted. Were we to conclude otherwise, we would be accepting unwarranted racial stereotypes." [P. 19a, *supra*], n. 6. For this there is

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records and only three had been prosecuted, but indicating that, to show a "colorable basis" for discovery "we would first require some evidence tending to show the existence of the essential elements of the defense" and characterizing existence of unprosecuted violations of statute defendant was prosecuted under as an "essential element"); *United States v. Cammisano*, 413 F.Supp. 886 (W.D.Mo.1976), *vacated on other grounds*, 546 F.2d 238 (defendants demonstrated many persons in apparently similar circumstances who violated Federal Meat Inspection Act, but who have not been prosecuted). In addition, in all but *Berrios*, there was direct evidence that the prosecution was brought for an impermissible reason. In *Steele*, the government admitted that it was concerned about census protestors and provided no non-discriminatory explanation for prosecuting Steele; in *Gordon*, a Department of Justice official said that the voting fraud investigation was brought about by "arrogance on the part of the blacks"; in *Adams*, a government official acknowledged that the defendant was prosecuted as "revenge" for her filing an EEOC claim; and in *Cammisano*, an FBI agent threatened defendant. By the same token, district court orders for discovery which have *not* been based on a finding that others similarly situated have not been prosecuted have been reversed. *See, e.g., Wayte*, 710 F.2d at 1387 (reversing discovery order on the footing that Wayte had not shown he was selected from the larger group because of his exercise of constitutional rights, but noting that the first element had been established because the district court had found that over 500,000 eligible men had not registered for the draft whereas only 12 others in addition to Wayte had been indicted for failure to register, all of whom were vocal nonregistrants); *Kerley*, 787 F.2d at 1150; *Irish People*, 684 F.2d at 946.

absolutely no authority. The need to identify similarly situated persons who have not been prosecuted does not evaporate when race is advanced as the constitutionally impermissible factor; rather, some evidence of those who are similarly situated except for the constitutionally impermissible factor but were not prosecuted is necessary in order to show that the defendant, who has that trait, has been prosecuted selectively. The issue is not prosecution, but *selective* prosecution, and there can be no *selective prosecution* without selection of the particular defendant for prosecution because of the constitutionally impermissible factor.

The majority opinion then holds that the government must explain "evidence of a significant statistical disparity." [P. 11a, *supra*]. There are two problems with this step. First, the FPD study does not show "significant" statistical "disparity." It is not a random sample in which every case has the same chance of being selected, nor is a sample of 24 cases indicted over four years but closed in a single year large enough, or representative enough, to say (or surmise) anything meaningful about the history of crack prosecutions in the Central District. The second, and more important problem lies in the fact that the opinion regards the government's explanation in this case as unpersuasive, and in so doing, essentially holds that the defendant's statistical showing cannot be explained without the full disclosure that the discovery requested would entail.[17] While the government *may* offer an

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[17] In this connection, the majority opinion asserts that the government's response "does not speak to the inference that blacks are more frequently prosecuted for *federal* crack offenses than even their allegedly disproportionate involvement with the drug would justify." [P. 22a, *supra*]. The

explanation and if it does, that explanation should be considered, there is no precedent that it must make any explanation or carry any burden at the discovery stage. In any event, imposing such a burden on the government provides the next building block for the opinion, which then says: "In the absence of a response undermining the study's accuracy, the district judge appropriately gave credence to the defendants' showing that a study of federal cocaine base cases *closed* by the federal public defender over a particular period of time showed that *only* black

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assertion implies that the response somehow should have spoken to the issue of state and federal prosecutions and is deficient because it didn't. This is incorrect because the *defendants'* showing says nothing about state and federal prosecutions of similarly situated offenders so there is nothing to respond to. More important, it slides into the balance of whether discovery should be ordered a consideration federal courts of appeal—including ours—have uniformly rejected as implicating equal protection: the fact that higher federal sentences for cocaine base offenses fall disproportionately on blacks. *United States v. Singleterry*, 29 F.3d 733 (1st Cir.), *cert. denied*, — U.S. ——, 115 S.Ct. 647, 130 L.Ed.2d 552 (1994); *United States v. Frazier*, 981 F.2d 92 (3rd Cir.1992), *cert. denied*, — U.S. ——, 113 S.Ct. 1661, 123 L.Ed.2d 279 (1993); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 2754, 129 L.Ed.2d 871 (1994); *United States v. Galloway*, 951 F.2d 64 (5th Cir.1992); *United States v. Reece*, 994 F.2d 277 (6th Cir.1993); *United States v. Chandler*, 996 F.2d 917 (7th Cir.1993); *United States v. Lattimore*, 974 F.2d 971 (8th Cir.1992), *cert. denied*, — U.S. — —, 113 S.Ct. 1819, 123 L.Ed.2d 449 (1993); *United States v. Coleman*, 24 F.3d 37 (9th Cir.), *cert. denied*, — U.S. ——, 115 S.Ct. 261, 130 L.Ed.2d 181 (1994); *United States v. Easter*, 981 F.2d 1549 (10th Cir.1992); *United States v. King*, 972 F.2d 1259 (11th Cir.1992), *cert. denied*, — U.S. ——, 113 S.Ct. 2448, 124 L.Ed.2d 665 (1993); *United States v. Thompson*, 27 F.3d 671 (D.C.Cir.), *cert. denied*, — U.S. ——, 115 S.Ct. 650, 130 L.Ed.2d 554 (1994).

defendants were involved." [P. 20a, *supra*]. Yet the study's *accuracy* is not at issue; its significance is. If a district court may credit a showing that cases closed by the FPD over a "particular" period of time involved only black defendants despite contrary evidence with respect to cases opened during the same period, there is no reason that a showing that cases closed in any "particular period of time"—one month, one week, or the two-days we rejected in *Bourgeois*—should not suffice, regardless of how many cases the attorney handles or how many others, similarly situated to the defendant but for race, were actually prosecuted during a reasonable period of time.

The majority opinion shifts the burden to the government in another respect that is unprecedented as well. It first assumes that "[g]iven the prevalence of all kinds of drugs throughout our community, at least *some* crack distributors are likely to be non-blacks." [P. 19a, *supra*]. This is probably correct, but is speculation nonetheless which has no basis in the record. From this premise, however, the opinion creates a presumption: "We must start with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." *Id.* Although "[t]hese presumptions and premises are, of course, not conclusive," *id.*, the opinion gives no clue as to what they are to prove, or how they are to be disproved. Because the opinion finds that the government's identification of some non-black crack offenders who have been charged does not undermine the force of the FPD study, [pp. 18a-19a, *supra*], apparently the presumption cannot be overcome by a showing that of "*some* crack distributors [who] are likely to be non-

blacks," *some* have been prosecuted. If that is so, it is unclear to me that the "presumption" is rebuttable at all. Nor does the opinion suggest why such a "presumption" is needed; the party who seeks to use statistics must show what the comparison pool looks like. Moreover, to the extent that this "presumption" is intended to suggest that the government has some obligation to charge equal numbers, or proportionate numbers, of black and non-black offenders—or explain why not, it turns the law of selective prosecution on its head. The government has the right to be selective about whom it prosecutes, so long as it does not select *this* defendant *because* of a constitutionally impermissible factor. *Wayte*, 470 U.S. at 610, 105 S.Ct. at 1532. Indeed, instead of flipping the burden as the opinion appears to do, we have previously recognized that the defendant's showing has to be considered "in light of the presumption of prosecutorial propriety." *United States v. One 1985 Mercedes*, 917 F.2d 415, 421 (9th Cir.1990) (denying discovery because defendant had failed to produce evidence of improper government motivation sufficient to justify discovery in light of the presumption of prosecutorial propriety and the two-prong requirement of vindictive prosecution, the same as for selective prosecution).

If the majority opinion remains the law, it will be at no small cost. In this case alone, locating more than 3000 files and figuring out which were crack and firearms prosecutions, the racial identity of each defendant (presumably from the Presentence Report, because the United States Attorney's Office has no records of race), and the investigating authorities will be a time-consuming and expensive process. The opinion is, of course, license for the same fishing expedition in legions of other cases. If a raw

number—the number of cases prosecuted—suffices for discovery, I would suppose that discovery could be called for in virtually every case. For example, 100% of antitrust convictions are of white males. *United States Sentencing Commission, Annual Report 1991*, tables 16 and 17. Of pornographers, 92.6% are caucasian. *Id.*, table 16. Men comprise 83.3% of all those convicted of all federal crimes. *Id.*, table 17. And so on.

Resources intended for controlling crime, one of the nation's most pressing concerns, will be chasing statistics instead. With the prospect of having to fight discovery and justify every charging decision, it will not be surprising for crack prosecutions to wane. *That* will disserve those who suffer from what the *Los Angeles Times* has just called "the plague [that] destroyed dreams, lives and families." *Los Angeles Times*, Dec. 21, 1994, at A1 (headline). The opinion will also force the government to keep statistics on race, turning the focus from race-neutral to race-numbered prosecutions. *That* is a step backwards toward race-conscious decisions.

This is not what we, or any other circuit, have permitted until now. If there are specific facts which afford a colorable basis for finding that discriminatory effect and discriminatory intent exist, the costs are worth it. Race cannot determine whether one is prosecuted or not. But, sound policy as well as separation of powers constraints demand that there be a meaningful threshold before the courts may authorize an intrusion into the discretionary workings of our co-equal branch. For these reasons, I cannot join the majority opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 93-50031, 93-50057

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CHRISTOPHER LEE ARMSTRONG,
AKA: CHRIS ARMSTRONG, DEFENDANT
and
ROBERT ROZELLE, AARON HAMPTON;
FREDDIE MACK; SHELTON AUNTWAN MARTIN,
DEFENDANTS-APPELLEES

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CHRISTOPHER LEE ARMSTRONG,
AKA: CHRIS ARMSTRONG, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Central District of California

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Before: HARLINGTON WOOD, Jr.,* REINHARDT, and RYMER, Circuit Judges.

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* Honorable Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation.

ORDER

The opinion and dissent filed January 21, 1994, slip op. 599, and appearing at 14 F.3d 1387 (9th Cir.1994), are withdrawn. A new opinion and dissent are filed in their place, and the petitions for rehearing and suggestions for rehearing en banc are dismissed as moot without prejudice.

OPINION

HARLINGTON WOOD, Jr., Senior Circuit Judge:

A federal grand jury indicted defendants Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle for conspiring to distribute cocaine base in violation of 21 U.S.C. § 846 (1988). Some of the defendants also were indicted on substantive cocaine base charges under 21 U.S.C. § 841(a)(1) (1988), and using a firearm in connection with drug trafficking under 18 U.S.C. § 924(c) (1988 & Supp. III 1991). The defendants moved for discovery on whether the government selected the defendants for prosecution because of their race, and the district court granted the motion. After denying the government's motion to reconsider, the district court dismissed the indictments as a sanction for failure to comply with the discovery order, but stayed the execution of the dismissals pending appeal by the government.

We have jurisdiction to hear the government's appeal from the final judgment of the district court pursuant to 28 U.S.C. § 1291 (1988) and 18 U.S.C. § 3731 (1988). For the reasons stated, we reverse.

I. FACTUAL BACKGROUND

A task force composed of Inglewood Narcotics Division detectives and Bureau of Alcohol, Tobacco, and Firearms (ATF) agents used three confidential

informants from February through April of 1992 to infiltrate a cocaine base[1] distribution ring. On seven occasions from February 13, 1992, to April 6, 1992, the informants purchased cocaine base totalling approximately 124.3 grams from the defendants. The informants also reported the use of multiple firearms by the defendants during the sales.

On April 8, 1992, task force police executed search warrants on the hotel room in which the informants made their purchases, as well as on residences belonging to some of the defendants. The officers arrested defendants Armstrong and Hampton in the hotel room, discovering 9.29 additional grams of cocaine base and a loaded gun. The officers subsequently arrested defendants Mack, Martin, and Rozelle pursuant to bench warrants the district court issued. Ultimately, the task force police seized multiple firearms and approximately 135 grams of cocaine base as a result of the investigation. All of the defendants are black.

The government sought indictments against all defendants in federal court. On April 21, a grand jury indicted all defendants for conspiracy to distribute cocaine base under 21 U.S.C. § 846. The indictment also charged some defendants with substantive cocaine base violations of 21 U.S.C. § 841(a)(1), and usage of a firearm in connection with drug trafficking in violation of 18 U.S.C. § 924(c). The federal statutes at issue provide for more stringent penalties than their California counterparts.[2]

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[1] Cocaine base is known more commonly as "crack" cocaine.

[2] Under 21 U.S.C. § 841(b) (1988 & Supp. III 1991), persons selling 50 grams or more of a mixture or substance containing cocaine base in violation of 21 U.S.C. § 841(a) must be imprisoned for at least 10 years and no more than life. Conspiracy, governed by 21 U.S.C. § 846, imposes the same penalty range as the § 841(a) violation. 18 U.S.C. § 924(c) imposes an additional, consecutive 5-year sentence without parole for the usage or carrying of a firearm during and in relation to any drug trafficking crime, as well as mandating longer sentences for repeat violations and more dangerous weaponry. California law, on the other hand, provides for a 3, 4, or 5-year sentence for cocaine base offenders, Cal.Health & Safety Code § 11351.5 (Deering 1993), and if firearms are involved, also provides for a 2, 3, or 4-year sentence, *id.* § 11370.1.

On July 20, 1992, defendant Martin filed a Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution, claiming that the government was prosecuting him because of his race. Defendants Armstrong, Mack, Hampton, and Rozelle all timely joined defendant Martin's motion. The district court held a hearing on the motion on September 8, 1992.

At the hearing, the defendants offered as evidence of selective enforcement an affidavit from a paralegal employed by the Office of the Federal Public Defender. The affidavit, which included a statement and a chart, asserts that in the 24 cases closed by the Federal Public Defender's Office in 1991 involving cocaine base violations of 21 U.S.C. § 841 and/or 21 U.S.C. § 846, the defendant in each case was black. The defendants for some reason did not offer an affidavit from the Federal Public Defender or any supervising attorney, or for that matter any other evidence at all, but instead relied solely on the affidavit from the paralegal employee. As a result, the government contended that the defendants failed to meet the showing required to compel discovery.

Nevertheless, on September 8, 1992, the district court disagreed with the government and granted the motion for discovery on the issue of selective prosecution. The district court ordered the government

to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases federally.

On September 16, 1992, the government filed a motion for reconsideration of the discovery order. In support of its motion for reconsideration, the government submitted sworn declarations of a Special Agent of the Drug Enforcement Administration with 21 years experience, a Special Agent of the Bureau of Alcohol, Tobacco, and Firearms with three years experience at the ATF and another three years as a narcotics officer, a narcotics detective from the Inglewood Police Department with 10 years on the force and three years experience in the narcotics unit, and two experienced Assistant United States Attorneys stating that: (1) the Office of the Federal Public Defender represented at least five non-black cocaine base defendants during the relevant time period; (2) the government prosecuted many non-black cocaine base defendants during 1991, the period at issue in the report prepared by the paralegal employed by the Office of the Federal Public Defender; (3) the county district attorney's offices prosecute many black cocaine base offenders; (4) the government based its decision to charge on the existence of federal firearms and narcotics violations that met the guidelines of the United States Attorney's Office, the strength of the evidence, the deterrence value, the federal interest, the suspects' criminal history, and other race-neutral criteria; and

(5) socio-economic factors account for the prevalence of drugs in certain communities, as illustrated by black gangs in the south-central Los Angeles area predominantly controlling the supply of cocaine base.

In response to the government's motion for reconsideration, the defendants offered two additional declarations. The first, made by one of the defense attorneys, states that she had spoken with a halfway house intake coordinator who told her that in his experience in treating cocaine base addiction, the number of Caucasian and minority users and dealers is equal. The other declaration, made by another defense attorney, asserts that (1) he has represented only blacks in federal court on cocaine base charges; (2) he has never heard of non-blacks being prosecuted in federal court on cocaine base charges; and (3) in his conversations with unnamed state court judges, prosecutors, and defense attorneys, he has come to believe that the state prosecutes many non-black cocaine base offenders in state court. The defendants also submitted an article from the *Los Angeles Times*, which contends that blacks disproportionately commit cocaine base offenses. *See* Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequality*, Los Angeles Times, Nov. 23, 1992, at A1, A20.

After a hearing on the motion for reconsideration, on December 29, 1992, the district court denied the motion. The government notified the district court on January 5, 1993 of its intention to challenge the discovery order and the denial of the reconsideration motion. As a sanction for failure to comply with the order, the district court dismissed the indictments of all defendants. The district court stayed the execution of the dismissals pending this appeal.

II. DISCUSSION

The parties did not discuss the relationship between two decisions of this court published within days of each other, *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir.1992), which was finalized on May 11, 1992, and *United States v. Bourgeois*, 964 F.2d 935 (9th Cir.1992), decided on May 19, 1992. *Bourgeois* and *Redondo-Lemos*, both thoughtful opinions, examined somewhat differently the process by which defendants can obtain discovery on a claim for selective prosecution.

In *Redondo-Lemos*, the defendant was caught transporting 695 pounds of marijuana into the United States from Mexico. The defendant pled guilty to a violation of 21 U.S.C. § 841(a)(1) in exchange for the government's promise to recommend that the district court impose only the mandatory minimum sentence of five years imprisonment. The district court, without any motion by the defendant, held that the United States Attorney's Office was selectively enforcing the drug laws against male defendants, and sentenced Redondo-Lemos to 18 months imprisonment instead of the 5-year mandatory minimum sentence.

On appeal, this court set forth the process for resolving a selective prosecution claim. First, *Redondo-Lemos* states that "[n]o one is entitled to call the prosecution to answer for a particular charging or plea bargaining decision without making a prima facie showing that wrongful discrimination is taking place." *Redondo-Lemos*, 955 F.2d at 1302. *Redondo-Lemos* states that a prima facie showing can be satisfied in one of two ways: (1) if "the district court develops a suspicion of unconstitutional conduct on the basis of its own day-to-day observations," or (2) if the defendant, rather than the

district court, is the one to raise the claim of selective prosecution, "he must present enough evidence to demonstrate a reasonable inference of invidious discrimination." *Id.* Only the suspicion of the district court, however, was at issue or applied in *Redondo-Lemos*.

Second, *Redondo-Lemos* states that once the prima facie case is established, the Office of the United States Attorney must have an opportunity to rebut the prima facie case. At this stage, the showing that the United States Attorney must make "would not involve file information about specific cases, but [rather would] consist only of overall case statistics." *Id.* Those overall statistics would be available to both the district court and defense attorneys. *Id.*

Third, if after the district court has seen the rebuttal evidence, the court finds discriminatory impact by a preponderance of the evidence, it then must determine if the prosecutor's charging decision was based on a discriminatory motive. *Id.* That decision "may, in rare instances, extend to in camera examination of certain prosecution case files and to limited discovery by opposing counsel." *Id.* In this third stage *Redondo-Lemos* for the first time raises the possibility of discovery by the defense. If, once the district court examines discriminatory motive and listens to government rebuttal evidence, the court finds by preponderance of the evidence intentional discrimination based on a suspect classification, it may fashion an appropriate remedy. *Id.*

Unlike *Redondo-Lemos*, *Bourgeois* confines itself to the question of when a defendant may obtain discovery based on a claim of selective prosecution. At issue in *Bourgeois* was a 2-day series of firearms arrests known as "Operation Streetsweep." *Bourgeois*, 964 F.2d at 936. Bourgeois, a felon, was

caught in Operation Streetsweep and indicted for possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *Id.* at 937. Bourgeois moved to dismiss the indictment based on selective prosecution, arguing that he was selected for prosecution because he is black. *Id.* Bourgeois also filed a discovery request for information regarding the sting operation in which he was arrested. *Id.* The district court denied the discovery request, and Bourgeois entered a conditional guilty plea. *Id.*

On appeal, this court examined the question of when defendants are entitled to discovery on selective prosecution claims. *Bourgeois* noted that to be ultimately successful on a selective prosecution claim, a defendant would have to prove "that others similarly situated have not been prosecuted and also that the prosecution is based on an impermissible motive." *United States v. Wayte*, 710 F.2d 1385, 1387 (9th Cir.1983), *quoted in Bourgeois*, 964 F.2d at 938. *Bourgeois* then explained that it was an open question as to whether the standard for obtaining discovery was different from the standard for ultimate success on a selective prosecution claim, and to what degree. *Bourgeois*, 964 F.2d at 938.

The *Bourgeois* court decided that defendants must satisfy a high threshold to obtain discovery. *Id.* at 939. The court adopted a high threshold first because "courts are ill equipped to assess a prosecutor's charging decisions," and second because "court oversight of prosecutorial decisions could undermine effective law enforcement." *Id.* The court sought to "discourage fishing expeditions, protect legitimate prosecutorial discretion, safeguard government investigative records, and yet still allow meritorious claims to proceed." *Id.* at 940. The standard the court adopted to accomplish these ends was that "to obtain

discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of the government." *Id.* at 939. *Bourgeois* noted that the "colorable basis" standard was meant to continue the trend of the past few decades, during which time only a handful of defendants obtained discovery on a selective prosecution claim. *Id.* at 940.

Thus, the question for us here is whether to apply the *Redondo-Lemos* "suspicion" test, the *Redondo-Lemos* "reasonable inference" test, or the *Bourgeois* "colorable basis" test. In our view, the record does not support the proposition that the district court based its discovery order on its day-to-day observations, and therefore the *Redondo-Lemos* "suspicion" test is inapplicable. That conclusion is grounded in the district court's reasoning for granting the defendants' request for discovery.

The district court, in explaining its decision to order discovery, stated: "The court sees it different than *Bourgeois*, in that in this case we do have something more than mere allegations." The court thus relied on the reasoning of *Bourgeois* in analyzing the defendants' evidence, not on its own day-to-day observations. Additionally, the district court noted that at issue is "a fairly general charge—one that we see regularly in this courthouse—and *whether it is coincidental or not*, that out of the group that the public defender [proffered] all of them happen to be of the same racial group." (Emphasis added.) This further illustrates the district court's reliance on the evidence, not its own suspicions. The fact that the district court specifically expressed no opinion as to whether the racial composition of

defendants represented by the Federal Public Defender was a coincidence indicates not suspicion, but rather a lack thereof.

The district court concluded that "the number [of black defendants shown by the public defender] is adequate that [it] would at least require the government to provide some explanation. The time period is such that would require some explanation. The charges are the same or similar, and the race is the same in each case." Those comments immediately precede the district court granting the motion for discovery, and are the basis for doing so. The record demonstrates that the district court based its decision on the evidence presented by the defendants, not on its own day-to-day observations. As a result, the *Redondo-Lemos* "suspicion" test is inapplicable, and we must choose between the *Redondo-Lemos* "reasonable inference" test and the Bourgeois "colorable basis" test.

Although neither phrase is easily susceptible to further definition, we believe that it would be more appropriate to apply the *Bourgeois* "colorable basis" test in this particular case than the *Redondo-Lemos* "reasonable inference" test. As previously noted, *Redondo-Lemos* did not apply the "reasonable inference" test, as the district court initiated the selective prosecution inquiry *sua sponte*. Additionally, in *Redondo-Lemos* the defendant was not seeking discovery. *Redondo-Lemos*, 955 F.2d at 1297. The court simply was attempting to explain the entire process for pursuing a selective prosecution claim, of which discovery is one part. *See id.* at 1297, 1302. We doubt that the court in *Redondo-Lemos* intended its discussion to be the final expression of law in discovery cases.

Bourgeois, on the other hand, addressed a situation similar to the one here. Bourgeois alleged that he was selected for prosecution based on his race, and filed a discovery request in an attempt to prove his claim. *Bourgeois*, 964 F.2d at 937. The court squarely confronted the issue of when a defendant is entitled to discovery, and devoted approximately three pages of analysis to that issue alone. *See id.* at 937-40. The court in *Bourgeois* analyzed a split in the circuits and supported its decision to apply the "colorable basis" test with policy analysis. *Id.* When a district court bases its decision on evidence supplied by the parties rather than on its own day-to-day observations, *Bourgeois* is the law of this circuit regarding the test for determining whether to grant a defendant's motion for discovery on a selective prosecution claim.[3]

Having decided that the *Bourgeois* colorable basis test governs here, we must now apply that test to the facts of this case. The defendants submitted three affidavits and a newspaper article in support of their motion for discovery. The first affidavit, the statement and chart by the paralegal that was the only evidence the defendants initially offered, was that of 24 cocaine base cases closed by the Office of the Federal Public Defender in 1991, all 24 involved black defendants.

Taken alone, that evidence does not establish "specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on

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[3] For the reasons discussed *infra*, we believe that the evidence proffered by the defendants would fail to meet any reasonable formulation of the test for obtaining discovery as enunciated in either case.

the part of the government." *Bourgeois*, 964 F.2d at 939. To demonstrate discriminatory application, a defendant must provide a colorable basis for believing that "others similarly situated have not been prosecuted." *Wayte*, 710 F.2d at 1387, *quoted in Bourgeois*, 964 F.2d at 941. The first affidavit demonstrates only that others *have* been prosecuted, not that others similarly situated have not—obviously, a total lack of evidence cannot constitute a colorable basis for believing that discriminatory application of the law exists.

Requiring defendants to provide a colorable basis for believing that others similarly situated have not been prosecuted is a reasonable requirement. "Selective prosecution" implies that a selection has taken place. If a defendant is part of a protected class, that alone does not provide a colorable basis for believing that a selection has taken place; nor does evidence demonstrating that other members of the protected class were prosecuted provide a colorable basis for so believing. Rather, a defendant must supply a colorable basis for believing that others similar to him except that they are not in his protected class were not prosecuted. Without a colorable basis to believe that others similarly situated were not prosecuted, the most reasonable conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental.

The evidence that all 24 cocaine base cases closed in 1991 by the Federal Public Defender involved black defendants is insufficient to provide a colorable basis to believe selection took place. The statistic in question does not speak to whether the Federal

Public Defender had other cases involving white defendants that did not close during that period. Additionally, there is no information on whether any of the defendants in the 24 cases were similarly situated to the defendants in this case. The government claims it selected the defendants for prosecution in this case because they committed cocaine base offenses while possessing firearms. If none of the 24 cases handled by the public defender involved firearms, the statistic is of little meaning, particularly in light of the government's explanation. As a final criticism, the statistic tells us nothing of the racial composition of defendants charged with drug trafficking who may have had sufficient resources to retain their own attorneys.

The defendants contend, however, that the statistic is meaningful in light of the newspaper article and two affidavits supplied in opposition to the government's motion for reconsideration. The article, from the *Los Angeles Times*, states that white cocaine offenders are being punished less severely because whites predominantly violate powder cocaine laws, while blacks predominantly violate crack cocaine laws, the latter of which carry longer sentences than the former. *See* Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequality*, Los Angeles Times, Nov. 23, 1992, at A1, A20. We agree with the district court's determination that nothing in the article supports the defendants' position; indeed, the article arguable cuts the other way. Perhaps the defendants were alluding to an argument that the federal sentencing scheme violates equal protection because of this disparity, but because they did not actually make the argument, we express no opinion on that matter here. Any fault in this regard, if fault indeed exists, does not lie with the United

States Attorney, for the United States Attorney plays no role in drafting the United States Sentencing Guidelines.

The two additional affidavits, although not harmful to the defendants' position like the newspaper article arguably is, are not helpful either. One of the affidavits, made by an attorney for one of the defendants, states merely that an intake coordinator at a Pasadena halfway house had told the defense attorney that "it was his experience in dealing with the treatment of cocaine base addiction, that there are an equal number of Caucasian users and dealers to minority users and dealers." This statement is: (1) hearsay—the defendants certainly could have gotten an affidavit from the intake coordinator himself; (2) unsubstantiated; (3) without any indication of sample size, duration, or methodology of any kind; (4) without an indication of whether the magnitude of the sales is similar to those of the defendants in this case; (5) based on "users and dealers" rather than dealers who possess firearms; and (6) based on users and dealers being treated for addiction, without any evidence that such a sample is representative of dealers as a whole. The district court erred in placing any weight on such flimsy evidence.

The other affidavit, made by another attorney for the defense, states that "I talk to many state court judges, prosecutors, and defense attorneys . . . [and] [t]here are many crack cocaine sales cases prosecuted in state court that do involve racial groups other than blacks. A major percentage of sales of crack cocaine cases are prosecuted against Latinos in the state courts." This statement: (1) is hearsay—there are no affidavits from any of the unnamed purported sources of this information;

(2) fails to indicate whether the magnitude of the sales is similar to those of the defendants in this case; (3) does not include any information about cocaine base offenses involving the possession of firearms; and (4) gives no statistics, but rather merely reports the defense attorney's personal conclusions that there are "many" cases and that there is a "major" percentage. These are hardly the "specific facts, not mere allegations, which establish a colorable basis for the existence of . . . discriminatory application of a law" envisioned by *Bourgeois*. *Bourgeois*, 964 F.2d at 939.

Given that the ineffective affidavits and arguably damaging article, even taken together, did not contradict the government's explanation for its decision to prosecute, we must conclude that the district court abused its discretion in concluding that the defendants' evidence provided a colorable basis to believe that discriminatory application of a law existed. *Bourgeois*, as previously explained, set a high threshold for obtaining discovery, and expressed very sound policy rationales for doing so. *See id.* at 939-40. Had the district court viewed the defendants' evidence in light of the reasoning of *Bourgeois*, it should have concluded that the evidence failed to establish a colorable basis for believing that the government was engaging in selective prosecution.

As a final matter, one could argue that *Bourgeois* should be distinguished based on the duration of the government operations involved in each case. In *Bourgeois*, a 2-day operation was at issue, *id.* at 936, and in the instant case the defendants proffered a 2-month "study" by the Office of the Federal Public Defender. That distinction, by the very language of *Bourgeois*, is unimportant in this case.

The court in *Bourgeois* found that Bourgeois had failed to establish a colorable basis that others similarly situated had not been prosecuted. *Id.* at 941. It did this because "Bourgeois [made] no attempt to show that, *in any span of time*, the government has declined to prosecute similarly situated, non-black felons illegally in possession of firearms." *Id.* (emphasis added). Thus, the court explained that regardless of the duration of the operation in question, defendants attempting to obtain discovery on a claim of selective enforcement must provide a colorable basis for believing that similarly situated felons not in their protected class were passed over for prosecution. The evidence in this case was unsatisfactory for the very same reason, and the duration of the operations in each case therefore is irrelevant.

III. CONCLUSION

The district court erred in finding that the evidence the defendants presented in this case established a colorable basis for believing that the government engaged in selective prosecution. The defendants' evidence, which likely would be inadmissible in other contexts, was tenuous at best, and in one case even arguably was counterproductive. If more than this quantum of evidence is not required, district courts too often and unnecessarily could become immersed in the workings of a coordinate branch of government, to the benefit of neither. Accepting the defendants' weak evidence and disregarding the sworn declarations of experienced federal agents and two Assistant United States Attorneys that explained and refuted the defendants' statistics was error, and for that reason the decision of the district court dismissing the indictments is

REVERSED.

REINHARDT, Circuit Judge, dissenting:

Rozelle and Armstrong, two black criminal defendants, present one of the most serious claims any person can raise—that the government has engaged in racial discrimination in selecting which offenders to prosecute. Such a claim deserves the most careful examination, for the ability to decide whether to bring charges gives prosecutors an awesome power to affect people's lives. When prosecutors use this power in a racially discriminatory manner, courts must step in to protect the objects of that conduct. Moreover, when one of our experienced district judges finds credible evidence that federal prosecutors are engaging in such impermissible discrimination, we should be most hesitant to prevent her from gathering further information that will permit a full examination of the claim. Yet the majority here abruptly cuts off exploration of the explosive charge made by these two defendants, concluding, surprisingly, that Judge Marshall abused her discretion in ordering further discovery. I disagree strongly with my colleagues' decision. The defendants have shown far more than a "colorable basis" for a belief that the practice of racially discriminatory prosecution exists. Moreover, the district judge's own observations and experience with the United States Attorney's office provide substantial additional support for the discovery order. For these reasons, and because recent studies indicate that further discovery might conclusively prove that prosecutors have engaged in unconstitutional conduct, I dissent.

I.

At the outset, it is important to make plain the narrow scope of our review, a scope which the majority clearly exceeds. First, we are reviewing only the district court's *discovery* order. The district court has not decided that the defendants have shown unconstitutional selective prosecution, and the defendants do not have to *prove* impermissible discrimination to obtain discovery. If they could make such a showing without any discovery, there would be no need for discovery in the first place. Because we review only the district court's decision to allow the defendants to gather more evidence, it is not our job to decide whether the defendants have made an ultimate showing of unconstitutional discrimination. Their burden in cases of this nature is far less.

Second, we review the district court's decision to order discovery for *abuse of discretion*. *United States v. Bourgeois*, 964 F.2d 935, 937 (9th Cir.1992). "The task of safeguarding the rights of criminal defendants ultimately rests with the experienced men and women who preside in our district courts." *United States v. Balough*, 820 F.2d 1485, 1491 (9th Cir.1987). District judges are uniquely situated to observe possible discrimination in the government's charging decisions. They have much more experience with the policies and practices of the United States Attorney in their district than do we, and they are obviously in a better position to observe a pattern of discrimination than are individual defendants. *See United States v. Redondo-Lemos*, 955 F.2d 1296, 1298, 1302 (9th Cir.1992). Accordingly, when a district court, knowledgeable of the practices and performance of a particular United States Attorney's

office, finds a defendant's showing of selective prosecution sufficiently persuasive to warrant further inquiry, we should only overturn its decision based on a very clear showing of error. Were my colleagues to afford the district court's determination the deference to which it is entitled, they would have no choice but to affirm.

II.

A.

The effect of the majority's decision is to create three highly artificial categories of cases. At one extreme are the cases in which a district judge completely ignores his or her own experience and observations and makes clear on the record that the discovery order is based *solely* on the submissions of the parties. Under the majority's opinion, this category of cases is governed by the *Bourgeois* standard, and the evidence submitted by the parties must create a "colorable basis" for the discovery order.[1] At the other extreme are those cases in

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[1] Unlike the majority, I see no practical difference between *Bourgeois's* "colorable basis" test and the "reasonable inference" test which *Redondo-Lemos* requires be used when a party offers evidence tending to establish selective prosecution. There is nothing in these phrases or in the courts' analysis in *Bourgeois* and *Redondo-Lemos* to suggest any difference between these standards. (Nor, incidentally, does the majority explain how they differ).

I note that the majority's recitation of the framework set forth in *Redondo-Lemos* is somewhat misleading. The majority states that *Redondo-Lemos* does not "raise[] the possibility of discovery by the defense" until after the defendant has presented evidence creating a "reasonable inference" of discrimination and the prosecution has had an opportunity to rebut this showing. [P. 75a, *supra*]. The majority ignores footnote 12 of *Redondo-Lemos*, which clearly contemplates

which, as in *Redondo-Lemos*, a district judge develops a suspicion of discriminatory conduct based purely on his own day-to-day observations and orders discovery or a hearing without any prompting by the parties. In this category of cases, the "suspicion" rule set forth in *Redondo-Lemos* requires a reviewing court to defer to the district judge's determinations.

In between these extremes lie the cases which surely arise most frequently—those in which a district judge's decision to order discovery is based in part on the evidence submitted by the parties and in part on his own personal experience, observations, and suspicions. Although in its opinion the majority, remarkably, does not acknowledge the existence of this category and thus does not discuss the standard to be applied in mixed-basis cases, it is clear that, whether these cases are viewed through the framework provided by *Redondo-Lemos* or that provided by *Bourgeois*, an appellate court should overturn a district court's order permitting discovery in such cases in only the rarest of circumstances. When the evidence presented by a defendant, combined with a district judge's own observations, convinces the judge that further inquiry is warranted, it should ordinarily be enough to satisfy *any* of the standards we have enunciated.

B.

The majority's decision to reverse the district judge is based on its conclusion that this case falls into the first of the three categories—that the record makes clear that Judge Marshall deliberately put

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"limited discovery in appropriate circumstances prior to the prosecutor's evidentiary presentation." *Redondo-Lemos*, 955 F.2d at 1302 n. 12.

aside her day-to-day observations and experience with the United States Attorney's office and based her decision solely on the parties' submissions. My colleagues conclude that in this case the district judge relied in *no* part on her own observations: "The record demonstrates that the district court based its decision on the evidence presented by the defendants, not on its own day to day observations." *Ante* at 1435-36. My colleagues appear to concede that when "the district court develops a suspicion of unconstitutional conduct on the basis of its own day-to-day observations, this will be deemed a sufficient prima facie showing" to support a further inquiry by the district court, including limited discovery. *Redondo-Lemos*, 955 F.2d at 1302. However, instead of treating this as a mixed-basis case, in which a district court's review of the evidence, augmented by its experience with the particular prosecutor's office, is entitled to substantial deference, the majority looks only at the evidence presented by the defendants. My colleagues then hold that the defendants' submissions fail to meet the *Bourgeois* standards for discovery.

C.

I have three objections to the majority's decision. First, as I have suggested, I believe that its creation of three arbitrary categories unnecessarily and improperly complicates this area of the law. Discovery orders in discriminatory prosecution cases should be judged by a single standard, one that draws on the principles enunciated in both *Redondo-Lemos* and *Bourgeois*. This standard should be appropriate for use in the vast majority of cases—those in which the district judge makes a decision to order discovery based in part on the evidence submitted by the parties and in part on his own observations and experience.

It should apply uniformly, regardless of whether the district court relies only slightly on the evidence presented by the parties and most substantially on his own experience, or vice versa, or even if the district court disclaims any knowledge of the general subject. In any event, the standard should require reversal of an order permitting discovery only when, giving substantial weight to the district court's own observations, the court could not rationally have reached the judgment it did.

Even assuming the majority's three-tiered approach is coherent or sensible, I disagree strongly with its decision to place this case in the first category—to classify it as a case in which the district court ignored its own experience and relied solely on the evidence presented by the parties. A fair view of the record demonstrates to me that Judge Marshall's decision to order discovery was based at least in part on her own observations of and experience with the United States Attorney's office.[2] If my colleagues were to consider that factor in combination with the evidentiary showing they reject, they would surely be required to uphold the district court's order. Thus, on remand Judge Marshall will be free to issue a new discovery order if she bases that new order in part upon her own day-to-day experience.

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[2] For example, in ordering discovery, the district judge stated:

> That is the problem I think that needs to be addressed, because we do see a lot of the cases and one does ask why some are in state court and some are being prosecuted in Federal court, and if it's not based on race what's it based on?

Finally, I believe that the defendants have made a sufficient evidentiary showing, wholly apart from the district judge's observations, to support the discovery order previously issued. Thus, even if I agreed with the majority that the district court entirely ignored its day-to-day observations and focused solely on the parties' evidentiary submissions, I would still affirm under the *Bourgeois* standard. I explain why below.

III.

The *Bourgeois* standard is not as difficult to meet as the majority's conclusion in this case might lead one to believe. Because we thought that a "non-frivolousness" standard would allow a defendant too easily to delay a prosecution and initiate intrusive discovery, and that a "prima facie case" standard would often make it impossible for defendants with legitimate claims to obtain the evidence necessary to support them, we sought a middle ground in *Bourgeois*. *See Bourgeois*, 964 F.2d at 938-39. We settled on a "colorable basis" standard:

> [T]o obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis of both discriminatory application of a law and discriminatory intent on the part of government actors.

Id. at 939.

Although we described the *Bourgeois* standard as establishing a "high threshold," *id.*, it is clear that under that test a defendant need not come anywhere close to proving a claim of selective prosecution in order to obtain discovery. Indeed, the defendant need not even present a prima facie case. The defendant instead need only present "some evidence tending to show the essential elements of the claim." *United*

States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir.1990) (discussing "colorable basis" standard). While a defendant will not satisfy his burden by merely presenting unsubstantiated or generalized allegations, he is entitled to discovery if he can show some specific facts which raise an inference of impermissible discrimination.[3]

Under the *Bourgeois* standard, the defendants have presented more than enough evidence to raise a sufficient inference of discrimination to warrant discovery. In particular, the study conducted by the Office of the Federal Public Defender raises a strong inference of invidious discrimination. This study found that, of all cocaine base cases closed by the Office in 1991, 24 out of 24 involved black defendants. To be sure, such a small sample does not conclusively establish either of the elements of selective prosecution. However, the fact that *every single* crack defendant represented by the Federal Public Defender in a case that terminated during 1991 was black certainly raises enough of a question to justify further inquiry by the court.

The evidence supporting an inference of discriminatory prosecution in this case is much stronger than the evidence we held insufficient to justify discovery in *Bourgeois*. In that case, the defendants argued that they were entitled to discovery based on a showing that all prosecutions for firearms violations stemming from a *two-day* police operation involved black defendants. The district

[3] Thus, the *Bourgeois* court's prediction that only a small number of defendants would be able to make a sufficient showing to obtain discovery was just that—a prediction. It provides no basis for artificially raising the standard which defendants must meet in order to gather more information on their discriminatory prosecution claims.

court rejected the defendants' claims, holding that two days was far too short a period to serve as a basis for analyzing the overall conduct of a prosecutorial agency. Instead of focusing on the single operation which resulted in the arrests of Bourgeois and his associates, the district court looked instead to all firearms prosecutions over a *two-year* span. The court found that the government had prosecuted over 140 people during that period for the same crimes as those for which Bourgeois was prosecuted. Because Bourgeois "did not allege that all or most of these cases involved blacks," *Bourgeois*, 964 F.2d at 940, the district court concluded that he had not established a colorable basis to justify discovery. We held that the district court did not abuse its discretion in refusing to order discovery in these circumstances. *See id.* at 941.[4]

[4] By lifting a sentence out of context and then misreading it, the majority unintentionally distorts our decision in *Bourgeois*. The majority states:

> The court in *Bourgeois* found that Bourgeois had failed to establish a colorable basis that others similarly situated had not been prosecuted. It did this because "Bourgeois [made] no attempt to show that, *in any span of time*, the government has declined to prosecute similarly situated, non-black felons illegally in possession of firearms." Thus, the court explained that regardless of the duration of the operation in question, defendants attempting to obtain discovery on a claim of selective enforcement must provide a colorable basis for believing that similarly situated felons not in their protected class were passed over for prosecution. The evidence in this case was unsatisfactory for the very same reason, and the duration of the operation in each case therefore irrelevant.

[P. 84a, *supra*] (citations omitted) (emphasis in majority opinion).

The evidence offered in *Bourgeois* involved only one operation, over a single two-day period. The Federal Public Defender study, by contrast, involved an agency that represents a significant percentage of all federal criminal defendants, and it involved all cases closed over a significant period of time. Common sense indicates that the inference of discrimination one can reasonably draw from such a study is much stronger than the inference one can draw from evidence involving only a single, short police operation. *See id.* at 941 ("[T]he relevant inquiry is the history of prosecutions over a reasonable period of time."). The study showed that the largest single provider of legal services to federal criminal defendants in the Central District of California did not conclude a single crack defense of a non-black defendant in *all of 1991*. Although the sample size is too small to resolve the issue either way, this evidence certainly raises a serious question whether

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Contrary to the majority's understanding, the issue in *Bourgeois* was *precisely* whether the defendants had shown discrimination *over a sufficient period of time*. The *Bourgeois* court assumed that, during the two-day period in question, the government had prosecuted only blacks and had failed to prosecute similarly situated non-blacks. However, it held that a two-day focus was too narrow: "The government need not provide discovery on a selective prosecution claim simply because law enforcement officials focused for a short time on a racially homogeneous criminal group." *Bourgeois*, 964 F.2d at 940-41. The sentence immediately preceding the one the majority selectively quotes states that "[a]s discussed above, the relevant inquiry is the history of prosecutions over a reasonable period of time." *Id.* at 941. In this context, the *Bourgeois* court's statement that "Bourgeois makes no attempt to show that, in any span of time, the government has failed to prosecute similarly situated, non-black felons illegally in possession of firearms" simply refers to the defendants' failure to make a showing of discrimination across a "span of time."

the government is intentionally discriminating against blacks. I do not see how the majority can conclude that it was an *abuse of discretion* for the district court to allow the defendants to inquire further into the issue.

The majority concludes that the Federal Public Defender study is insufficient to warrant discovery because it "demonstrates only that others *have* been prosecuted, not that others similarly situated have not." [P. 80a, *supra*]. Yet even by the majority's own standard a defendant is not required to *demonstrate* that the government has failed to prosecute others who are similarly situated. He need only "*provide a colorable basis* for believing that others similarly situated have not been prosecuted." [P. 80a, *supra*]. (emphasis added). The study introduced by the defendants clearly satisfies this requirement. Given the prevalence of all kinds of drugs throughout our community, at least *some* crack distributors must be non-blacks. The fact that the Office of the Federal Public Defender had not closed a case involving *a single* non-black defendant in an entire year provides at least a colorable basis to believe that some non-black offenders existed whom the United States Attorney failed to prosecute.

When a defendant presents statistics *tending* to show that *all* prosecutions over a significant period of time are directed at members of a single race, such a presentation alone should raise sufficient suspicion to warrant a further inquiry. On closer scrutiny, we may discover that the statistics can be explained by methodological defects, such as an inadequate sample size or an insufficient time-frame. However, one fact we most assuredly will *never* find. If our method of analysis is at all fair or rational, we will *not* discover

that it is *only* members of the defendant's race who commit the crime in question.

Contrary to the majority's view, we must assume, what is unquestionably the case, that people of *all* races commit *all* types of crimes. Under no circumstances can we base our analysis on the premise that any type of crime may be the exclusive province of any particular racial or ethnic group. Yet that is precisely what the majority does. Even if the defendants made a conclusive showing that the government had only prosecuted members of a single race for a particular class of crime, the majority would apparently conclude that they had failed to meet their burden. My colleagues would apparently require the defendants to present *affirmative evidence* showing that similarly situated potential defendants of other races existed—in other words that whites and browns also commit violations of 21 U.S.C. §§ 841 and 846. *See ante* at 1436 ("The first affidavit demonstrates only that others *have* been prosecuted, not that others similarly situated have not—obviously, a total lack of evidence cannot constitute a colorable basis for believing that discriminatory application of the law exists."). Unless we make the unsupportable assumption that there is a reasonable possibility that *only* blacks commit the crimes with which the defendants are charged, the majority's analysis is manifestly erroneous. If the United States Attorney's office prosecutes only members of a particular race, simple logic and common sense tell us that it is failing to prosecute at least some similarly-situated members of other races. Where a defendant shows a reasonable statistical basis for the inference that all defendants charged with a particular federal crime over a significant period of time were members of a single

race, such a showing creates, ipso facto, a colorable basis for believing that similarly situated members of other races were not prosecuted. Therefore, there is no legal basis whatsoever for requiring the defendant to point to particular cases in which the government failed to prosecute similarly-situated members of other races.

The majority rightly notes that the Federal Public Defender study does not in itself establish that the United States Attorney has engaged in selective prosecution. It is true that the study refers only to cases *closed* in 1991 and that it fails to provide more detailed information regarding the specifics of the offenses the other defendants allegedly committed. It is also true that the study does not disclose whether any non-black defendants existed who could afford to hire their own attorneys. *See* [p. 80a, *supra*]. While these aspects of the study render it insufficient to support an ultimate showing of unconstitutional selective prosecution, the facts set forth are nonetheless more than enough to support a finding of a colorable basis for the claim that discrimination exists. Despite the limitations in the study's methodology, it is sufficient to lead a reasonable person to believe that the United States Attorney might be engaging in discrimination and that further inquiry on the subject is warranted. That is precisely the course the district court took here, and I do not believe that it abused its discretion in doing so.

Although the Federal Public Defender study should have been enough to create a colorable basis, the defendants here did provide additional evidence that the federal government failed to prosecute similarly-situated non-black defendants. On the government's motion for reconsideration, the defendants introduced two affidavits from different defense

attorneys. One related a statement made by an intake coordinator at a Pasadena halfway house who said that, in his experience, there were an equal number of white and non-white users and dealers of crack. The other affidavit came from David R. Reed, an experienced criminal defense attorney in the Central District. Reed stated that, in his experience as a federal criminal defense lawyer and as a director of the state court indigent defense panel, he had never handled, known of, or heard of a single federal crack cocaine case involving non-black defendants, but that he knew of many crack cocaine cases prosecuted against non-blacks in state court.

My colleagues wholly discount these affidavits. Their analysis is flawed in two separate respects, however. First, they seem to believe that the affidavits must be considered in isolation, rather than in light of the Federal Public Defender Study. They criticize the district court for "placing any weight" on the first affidavit, [pp. 79a-80a, *supra*], and they state that the second affidavit failed to contain "the 'specific facts, not mere allegations, which establish a colorable basis for the existence of . . . discriminatory application of a law.'" [Pp. 79a-80a] (quoting *Bourgeois*, 964 F.2d at 939). Whether or not it would have been appropriate for the district court to place any weight on the declarations if they stood alone, they surely satisfy the defendants' burden when considered in light of the study's finding that *all* federal crack defendants were black. When all of this evidence is taken together, the defendants have established several "specific facts, not mere allegations, which establish a colorable basis" to believe that the government has engaged in selective prosecution: (1) in all crack cocaine cases closed by the Federal Public Defender's Office in 1991, not a

single case involved a non-black defendant; (2) an individual with professional experience in treating cocaine base addicts was of the opinion that minorities and non-minorities used and dealt crack in roughly equal numbers; (3) a criminal defense lawyer experienced in defending individuals in federal court, and overseeing indigent defense in state court, had knowledge of many non-black crack offenders who were prosecuted in state court, but none who were prosecuted in federal court.

Second, the majority appears to ignore the fact that the defendants are only seeking *discovery* on their selective prosecution claim. The defendant's burden in seeking discovery is obviously significantly less than the defendant's ultimate burden of proving that the government engaged in discriminatory prosecution. Under *Bourgeois*, a defendant need not even present a prima facie case in order to obtain discovery, only a colorable basis. *See Bourgeois*, 964 F.2d at 939. There is no reason to require the defendant to produce admissible evidence in making such a showing.[5] In other contexts in which a party bears a lighter burden of proof than a preponderance of the evidence, the law has held that the lesser *quantum* of evidence required also entails looser requirements regarding the *admissibility* of that evidence. *See, e.g., Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956) (grand jury); *United States v. One 56-Foot Motor Yacht Named*

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[5] I should emphasize that the Federal Public Defender study was clearly admissible, and, in my view, it was sufficient in itself to create a colorable basis. The majority only challenges the admissibility of the two declarations. In this connection, I should note that any objection as to admissibility must be raised in the district court and that no such objection was made here.

the Tahuna, 702 F.2d 1276, 1283 (9th Cir.1983) (probable cause for forfeiture); Fed.R.Crim.P. 5.1(a) (preliminary probable cause hearing). That rule is applicable here as well. The majority thus errs in dismissing the declarations as hearsay.

The majority also errs by appearing to require the defendants to substantiate their claims more fully at this stage of the proceedings than is necessary under *Bourgeois*. In order to obtain discovery, defendants should not be required to present sophisticated regression analyses closely following the dictates of the scientific method. Nor should they be required to compile facts which are not readily available to them, such as the racial breakdown and offense characteristics of defendants represented by other counsel. Instead, they should only be required to show that specific facts raise a strong inference of impermissible discrimination, and they should only be expected to use whatever evidence is within their possession or reasonably obtainable. The defendants here have satisfied that burden.[6]

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[6] I should note that nearly all of the data necessary to a showing of selective prosecution are far less accessible to the defendants than to the federal government. Federal and county law enforcement authorities cooperate closely in these cases, and both levels of government are involved in the decision whether to bring charges in federal or state court. The Assistant United States Attorney admitted as much before the district court. He stated that many cocaine base cases were investigated as part of a joint federal/state task force involving local police departments and the federal Bureau of Alcohol, Tobacco, and Firearms. Given that the federal and local authorities work so closely in investigating these crimes, the federal government probably already has records of the cases in which it declined to initiate a federal prosecution. In any event, it is surely much easier for the United States Attorney's office to get this information from state officials, from the

IV.

As I explained above, the majority's opinion leaves Judge Marshall free on remand to impose the same discovery order as she had before, so long as she explains that she is basing her order in part on her personal observations of and experience with the United States Attorney's office. In addition, even disregarding that factor, it appears that a sufficient factual basis now exists to satisfy even the majority's overly restrictive application of our standards. A study by Richard Berk of the Center for the Study of the Environment and Society of the University of California at Los Angeles demonstrates that the United States Attorney has failed to prosecute similarly situated white offenders. *See* Richard Berk and Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sentencing Rep. 36 (1993). Although this study was not before the district court, and thus is not part of the record we review, it provides further indication that the majority has erred in disregarding the evidence that is before it and in overturning the district court's order.[7] If the defendants renew their

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county prosecutor's offices, and from local police departments than it is for criminal defense lawyers. Federal, state, and local law enforcement authorities have a cooperative relationship; prosecutors and defense lawyers have an adversarial relationship. Especially since the pertinent records relating to cases in the geographical area covered by the Central District may well be scattered across seven different county district attorney's offices, seven separate sheriff's departments, and a large number of independent local police departments, the defendants would have an almost impossible time compiling data on their own.

[7] We may take judicial notice of this published study on appeal. *See Brown v. Board of Education*, 347 U.S. 483, 494 n.

motion on remand and introduce this study as evidence, the district court would clearly be justified—even without considering its own experience—in reinstating the discovery order.

The Berk study analyzed both state and federal data concerning crack cocaine offenses in the Los Angeles area. Specifically, it analyzed all arrests for sale of cocaine base within Los Angeles County between January 1, 1990 and October 10, 1992, all cases referred to the Los Angeles County District Attorney for sale of cocaine base between January 1, 1990 and August 11, 1992, and all sale of cocaine base cases prosecuted by the United States Attorney for the Central District of California between 1988 and 1992. *See id.* at 36.

Analyzing these data, the Berk study reached some alarming conclusions, which are consistent with the defendants' position here.[8] Like the Federal Public Defender study, the Berk study found that, over a nearly two-year period, the United States Attorney did not charge even a single white person with sale of crack cocaine. By analyzing state data, however, the Berk study also refuted the majority's implicit assumption that non-blacks simply do not commit these crimes. Indeed, the data showed that the Los Angeles County District Attorney charged over two hundred whites with sale of cocaine base during this period.

The Berk study's conclusions strongly suggest that the United States Attorney's office has engaged in discriminatory prosecution. Although only 58 per

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11, 74 S.Ct. 686, 692 n. 11, 98 L.Ed. 873 (1954); *Swan v. Peterson*, 6 F.3d 1373 n. 9 (9th Cir.1993).

[8] The statistical conclusions of the Berk study are summarized on page 37.

cent of the arrests in Los Angeles County for sale of crack during the study's time period involved blacks, and only 53 per cent of crack sale charges by the Los Angeles County District Attorney involved black defendants, the United States Attorney targeted black defendants a full 83 per cent of the time. The disparity between the state and federal figures would seem to necessitate a further investigation of the reasons for the differing actions by the two prosecutorial agencies. In conducting his study, Professor Berk performed chi-squared tests to determine whether the results of his statistical survey could be attributed to chance rather than discrimination. He found that "[f]or the federal data, the chances are less than 1 in 100 (p-value = .0088) that they are just a 'luck of the draw' sample for the population of people arrested." *Id.* at 38.

The Berk study, as well as the data proffered by the defendants in this case, is sufficient to raise a serious question about whether the United States Attorney's office is treating all of the people it serves equally. In particular, it raises the question of whether the United States Attorney reserves the ten-year federal mandatory minimum sentences for black defendants, while allowing non-black defendants to receive three, four, or five year sentences in state court. We cannot tolerate basing the length of a sentence on the color of a defendant's skin. Where there is a *colorable* showing that this may be occurring, an inquiry is required.

V.

As a practical matter, as I have pointed out, the majority's opinion will have little or no effect on the further proceedings in the district court. The Berk study, which was not before the court when it made

its discovery order here, will certainly provide enough of an additional "colorable basis" to support discovery if and when the defendants file a renewed or amended motion following remand. So, too, will the personal knowledge and experience that the majority finds Judge Marshall failed to avail herself of the first time.

Nonetheless, it is most unfortunate that the majority overrules Judge Marshall's considered attempt to gain more information about the United States Attorney's charging practices. The five to seven year difference between state and federal sentences for crack sale offenses is not merely academic—five years is a long time to spend in prison. As long as this disparity exists, federal courts have an obligation to make sure that the United States Attorney is treating all members of the community fairly and equally.

Judge Marshall's actions showed the judiciary at its best. Unlike the majority, I would not be so quick to overrule her attempt to explore this critical issue and to get more objective information before the court. Certainly, there is no basis whatsoever for concluding that Judge Marshall *abused her discretion* in trying to do so and in determining that the defendants made a *colorable* showing of discriminatory enforcement of the law.

Judge Marshall acted properly by ordering discovery with respect to this issue. I would affirm.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES — GENERAL

Case No. CR92-336 CBM Date 12/29/92

DOCKET ENTRY: The Government's motion for reconsideration of Court's Ruling is denied (CMB)

Present: HON. CONSUELO B. MARSHALL, JUDGE

Joseph M. Levario	n/a	n/a
Deputy Clerk	Court Reporter	Asst. U.S. Attorney

U.S.A. v. (DEFENDANTS LISTED BELOW) ATTORNEYS FOR DEFENDANTS

(1) Christopher Armstrong, et al. (1) n/a
_present _custody _bond _O/R _present__appointed _retained

(2)
_present _custody _bond _O/R _present__appointed _retained

(3)
_present _custody _bond _O/R _present__appointed _retained

(4)
_present _custody _bond _O/R _present__appointed _retained

[Certificate of Service Omitted]

MINUTES FORM 6
CRIM-- GEN D-M Initials of Deputy Clerk J